United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-7295

To be Argued by
JANET BENSHOOF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHERYL PERRY HILL, THELMA LINDO, VICTORIA RAPHAEL, LURLINE RUTHERFORD and ANSONIA LEWIS, for themselves and all persons similarly situated,

Plaintiffs-Appellants,

-against-

A-T-O, INC., FAMILY BUYING POWER, INC., NATIONWIDE PROMOTIONS, INC., EXECUTIVE BUYING POWER, INC., FAMILY CLEANING POWER, INC., COMPACT ASSOCIATES, INC., COMPACT BELLEROSE, INC., COMPACT ELECTRA CORP., HYMAN SINDELMAN, a/k/a HY DELMAN, M. ROBERT DORTCH and FRANK DORTCH,

Defendants-Appellees.

BRIEF FOR PLAINTIFFS-APPELLANTS

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PREFACE

This is an appeal from two orders of Judge Walter Bruchhausen of the United States District Court for the Eastern District of New York. The first order, dated March 5, 1975, granted defendants leave to reargue their motion for summary judgment, granted summary judgment and dismissed the complaint. The second order, dated April 11, 1975, denied plaintiffs' motion for leave to amend their complaint and 9(g) statement.

Plaintiffs were granted leave to proceed in forma pauperis in the District Court on November 30, 1973. Accordingly, under Rule 24 of the Federal Rules of Appellate Procedure and Rule 30 of the Rules of the Second Circuit, this appeal will be heard on the original record without the necessity of an appendix. An index to all papers in the record has been prepared with numbers 1 through 93 corresponding to the order of the sets of documents in the record. References to the record in the brief will use the index number. For example, plaintiffs' complaint is index number 2 so it will be found at "I-2". A copy of the index to the record is attached as an addendum to this brief.

QUESTIONS PRESENTED

1. Did the Court below err in requiring explicit individual proof of 'actual coercion' necessary to prove an illegal tie-in arrangement under §1 of the Sherman antitrust law?

2. Did the Court below err in finding there was no genuine issue of fact as to whether or not plaintiffs were actually coerced into the tying arrangement?

3. Did the Court below err in denying plaintiffs leave to amend their complaint and 9(g) statement and to submit additional evidence?

STATEMENT OF THE CASE

This action under the federal antitrust laws, 15 U.S.C. §§ 1, 15, and 26, and 28 U.S.C. § 1337, was filed in the United States District Court for the Eastern District of New York on December 3, 1973. Plaintiffs sue on behalf of themselves and as representatives of a class, each member of which purchased a "membership" in Family Buying Power, a direct-discount purchasing plan, along with a vacuum cleaner or "home cleaning system," from defendants COMPACT ELECTRA CORP., COMPACT ASSOCIATES, INC., COMPACT BELLEROSE, INC., COMPACT DISCOUNT, INC. and/or HYMAN SINDELMAN ("the Compact defendants"). Defendants FAMILY BUYING POWER, INC., NATIONWIDE PROMOTIONS, INC., EXECUTIVE BUYING POWER, INC., FAMILY CLEANING POWER, INC., M. ROBERT DORTCH and FRANK DORTCH ("the FBP defendants") operate the Family Buying Power service from offices in Cranbury, New Jersey. Defendant A-T-O, INC. ("ATO") through its Interstate Engineering division manufactures the vacuum cleaner and attachments at a plant in Anaheim, California.

ATO answered the complaint on January 28, 1974. By notice of motion dated March 12, 1974, the FBP defendants moved to dismiss the complaint pursuant to F.R.C.P. Rule 12(b)(6), to obtain a more definite statement pursuant to F.R.C.P. Rule 12(c), and to strike certain allegedly

scandalous and prejudicial statements from the complaint pursuant to F.R.C.P. Rule 12(f). By notice of cross-motion dated March 14, 1974, the Compact defendants moved for similar relief and for an order dismissing the claim of CHERYL PERRY HILL on the ground that it was time-barred under the applicable statute of limitations, 15 U.S.C. § 15b. These motions were joined in by ATO, which filed affidavits and a memorandum in support thereof. Plaintiffs then filed an amended complaint as of right, a demand for jury trial, and affidavits and a memorandum in opposition to defendants' motions.

In an opinion dated June 19, 1974, the court below, Bruchhausen, J., denied defendants' motions and scheduled a pre-trial conference for October 10, 1974. Thereafter, the Compact defendants filed their answer and counterclaims on July 3, 1974. The FBP defendants filed their answer on July 10, 1974. ATO filed an answer to the amended complaint on July 11, 1974. Plaintiffs replied to the Compact counterclaims, interposed counterclaims in reply, and served written interrogatories on ATO, two of the FBP defendants, and Hyman Sindelman, President of the Compact defendants. Sindelman answered plaintiffs' interrogatories on August 26, 1974. ATO and the FBP defendants also answered plaintiffs' interrogatories, subject to objections.

By notice of motion returnable October 10, 1974, ATO

moved to strike plaintiffs' jury demand as untimely, F.R.C.P. Rule 38(b). By notice of cross-motion dated October 1, 1974, returnable October 10, 1974, plaintiffs moved for an order pursuant to F.R.C.P. Rules 12(b)(6) and 13 dismissing the sixth counterclaim of Compact Electra Corp. and pursuant to F.R.C.P. Rule 23(b)(3) certifying the action as a class action. These motions were adjourned to December 11, 1974 on consent.

By notice of motion dated November 29, 1974, returnable December 11, 1974, the Compact defendants moved for summary judgment pursuant to F.R.C.P. Rule 56, for a stay of all proceedings in the action, and striking plaintiffs' jury demand as to all issues contained in defendants' counterclaims and in plaintiffs' reply counterclaims. By notice of motion dated December 2, 1974, returnable December 11, 1974, the FBP defendants also moved for summary judgment. Defendants ATO joined in this motion.

In a memorandum and order dated January 21, 1975, the court below granted plaintiffs' motion for a class action certification, granted plaintiffs' motion to dismiss the sixth counterclaim of defendant Compact Electra Corp., and denied <u>in total</u> the defendants' motions for summary judgment, for a stay, and for an order striking plaintiffs' jury demand. Exactly ten days later, the Compact defendants moved for leave to reargue the decision of January 21st. ATO and the FBP defendants joined in the motion to reargue,

and plaintiffs submitted an affidavit in opposition thereto. In an opinion dated March 5, 1975, the court granted reargument and granted summary judgment dismissing the complaint.

By notice of motion dated March 14, 1975, returnable April 4, 1975, plaintiffs moved for leave to amend the complaint and 9(g) statement, to submit additional evidence, and for reargument and reconsideration of the March 5th decision. This motion was denied by order dated April 11, 1975. Notice of appeal to this Court was filed on April 16, 1975.

STATEMENT OF FACTS

This action is brought by several individual plaintiffs on behalf of a class of some 10,000 low-income consumers all of whom entered into contracts with the defendants for the purchase of vacuum cleaners with accessories and "memberships" in a direct buying discount plan between March 20, 1969 and December 3, 1973. Plaintiffs' claim for injunctive relief and treble damages is pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The original complaint and the amended complaint both allege that defendants are liable to plaintiffs and the class they represent by reason of two violations of the Sherman Act, 15 U.S.C. § 1. First, that defendants have agreed to use and have imposed an illegal tie-in arrangement the effect of which is to unreasonably restrain trade and commerce in home vacuum cleaners among the several states. Second, defendants have conspired to use a selling program consisting of misrepresentation and fraud, and they have used such a program to the detriment of free competition in interstate commerce. Plaintiffs are individual consumers who have been injured as a result of these illegal agreements and practices in that they have purchased products from defendants at prices higher than would have prevailed had not free competition been subverted by the conduct of

which plaintiffs complain.

The first defendant is ATO which manufactures a vacuum cleaner and accessories. The vacuum cleaner "is a canister-type device designed for residential home use, sold as a 'compact system' with several attachments including a waxer-polisher, sprayer and 'demother' . . ." (Amended Compl. ¶ 16, I-60). The FBP defendants offer for sale memberships in a quotation and buying service ("the buying plan") through which members, who pay an annual membership fee, can supposedly obtain substantial discounts on a wide variety of merchandise. The Compact defendants market the vacuum cleaner and the buying plan only through in-home sales in the New York City area pursuant to exclusive territorial franchises from both ATO and the FBP defendants. The vacuum cleaner and buying plan (membership in FBP) are sold only on a combined basis. While defendants style the buying plan as a "gift", they do not deny that the only time such "gifts" are made is when the customer agrees to purchase the vacuum cleaner. (Amended Compl. ¶ 23, I-60; Def. Compact's Ans. to Plf. Interrog., Nos. 6, 8, I-41)

It is undisputed that the buying plan memberships and vacuum cleaners are tied together. Plaintiffs claim this tie-in is illegal per se violating § 1 of the Sherman Act, 15 U.S.C. § 1. Defendants link a unique and highly desirable product with a second, "ordinary" product thereby unfairly enlarging their share of the market for the second product

to the detriment of free competition and of the consumer. The "tying product" -- the magnet that drew plaintiff consumers to purchase from defendants was Family Buying Power, a buying plan whose members allegedly could obtain virtually all consumer items at wholesale prices. The "tied" product was a vacuum cleaner known as the "Compact Electra". Plaintiffs contend that they and their class were lured, induced, and coerced into purchasing the Compact Electra as a direct result of defendants' admitted tying of the buying service membership to the vacuum cleaner. The uniqueness, value and utility of the buying plan are extolled and the customer is told that normal use of the plan will save him many times over the cost of the Compact vacuum cleaner. (Plf. Ans. to Interrog. of Def. ATO, Ex. A, Ans. of Plf. RUTHERFORD, ¶ 12d, I-35; Aff'd. of Plf. HILL, ¶ 4, I-64; COMPACT Ans. to Plf. Interrog. No. 34, I-41). The salesman asserts he is not selling the buying plan and the customer is told the only way he can obtain it is by purchasing a vacuum cleaner. (Aff'd. of DOUGLAS ACKERMAN, Exs. D, E, F, I-23) The unique membership is available only from the salesman, and only during the first, in-home sales presentation. (Id., Exs. D, E, F, I-23) Members would have access to use of a "personal purchasing agent whose job it is to get the best buys possible" -- and thus cuts out middleman costs including "retail ads, sales commissions and store profit." (Id., Ex. E, p. 3, I-23) Plaintiffs were forced to pay a

high price ($359 to $399) for a vacuum cleaner that they did not want in order to get membership in the highly desirable buying service. In many instances, plaintiff already had a vacuum cleaner or had no use for the cleaner. (Aff'd. of Plf. HILL, ¶ 5, I-64; Aff'd. of Plf. RAPHAEL, ¶ 6, I-64; Aff'd. of Plf. LEWIS, ¶ 4, I-64) Plaintiffs further allege that the tied products, the vacuum cleaner and buying service, were not as represented and that the fraud and misrepresentation resulted to injury to themselves and to free competition. (Aff'd. of Plf. HILL, ¶ 10, I-64; Plf. Ans. to Interrog. of Def. ATO, Ex. A, Ans. of Plf. LINDO, ¶ 21, I-35; Aff'd. of Plf. HILL, ¶ 9, I-64; Aff'd. of Plf. LEWIS, ¶ 5, I-64)

POINT I

THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE COMPLAINT

In its January 21, 1975 decision, the court below denied defendants' motions for summary judgment on the ground that factual issues were presented which had to be resolved at trial. Subsequently, on March 5, 1975 the district court granted defendants' motions for reargument and on the authority of Capital Temporaries, Inc. of Hartford v. The Olsten Corporation, 506 F. 2d 658 (2d Cir. 1974), granted summary judgment dismissing the complaint. The ruling was based upon a finding of the absence of an explicit assertion of coercion in the complaint, the 9(g) statement, and the affidavits.

Plaintiffs assert this finding was in error not only because the facts presented in the record show actual coercion (see Point B, *infra*), but also because the Court below misinterpreted the legal standard of actual coercion defined in *Capital Temporaries*.

A. The Court Below Misapplied The Legal Standard of 'Actual Coercion' Defined In Capital Temporaries of Hartford, Inc. v. The Olsten Corporation.

The district court in this case interpreted *Capital Temporaries* to require explicit individual proof of actual

coercion in every tie-in case and found that plaintiffs had not fulfilled this requirement. This interpretation is incorrect because the finding in Capital Temporaries that plaintiffs were not actually coerced into accepting the products together and therefore there was no tie-in came only after a finding that there was no market power in the tying product and no requirement, contractual or otherwise, that the two franchises had to be taken together. The Supreme Court and Second Circuit cases relied on in Capital Temporaries infer coercion from the presence of market power in the tying product, a policy of tie-ins, and a large number of tying arrangements. The Court below was thus in error in requiring plaintiffs herein to explicitly allege and prove individual actual coercion when there was ample proof of market power in the tying product, an admitted policy of selling membership in Family Buying Power only with the Compact vacuum cleaner, and a large number of tying arrangements detrimental to the buyers, from which coercion should be inferred or implied.

In Capital Temporaries, a franchisee of the Olsten Corporation claimed, inter alia, that Olsten had illegally tied its "Handy Andy" blue collar franchise (tied product) to the desired "Olsten" white collar franchise (tying product). The Court of Appeals affirmed the dismissal of the tie-in claim, finding that not only were the prerequisites of an illegal tie-in per se absent but in fact there was no

tying arrangement. 506 F. 2d at 667. The franchise agreement licensed plaintiff to use both the white collar and blue collar trademarks but did not clearly require that a blue collar temporary labor business be opened. The Court ruled that even if the contract in question were construed to require the opening of a "Handy Andy" operation, no Sherman Act violation could be found. The Court noted that "there is no proof or evidence to suggest that [plaintiff] objected to the package, that he was only interested in a white collar operation, that the blue collar operation was forced upon him, <u>or</u> . . . <u>that the Olsten white collar mark and service were so unique and attractive that he had no alternative</u>." 506 F. 2d 666 (emphasis added). This language shows that a showing of actual coercion is necessary only when coercion or leverage cannot be inferred from the existence of market power in the tying product. The Court in <u>Capital Temporaries</u> found no market power in the tying product, the Olsten white collar service. It did not have market dominance nor was it a unique or attractive service. Moreover, the Court held the trademark could not infer economic power, distinguishing cases involving patents and copyrights. As the tie itself may be some evidence of market power, the Court in <u>Capital Temporaries</u> then looked at such factors as the lack of objections to the tie-in by the purchaser in the course of negotiations and the purchaser's state of mind to see if the "tie" actually existed

or if the buyer would have been free to purchase the desired franchise alone.

The acceptance of the principle that coercion could be presumed from market power is further borne out by other language in the opinion.

> "From this review of the cases we conclude that the plaintiff must establish that he was the unwilling purchaser of the tied product. If he was not coerced by the economic dominance of the seller he must at least show that he was compelled to accept the tied product by virtue of the uniqueness or desirability of the tying product, which other competitors could not or would not supply." Id. at 663.

The implicit holding that economic dominance or other evidence of market power implies coercion is further evidenced by the Court of Appeals discussion of how the use of coercive pressure was established in Supreme Court tie-in cases.

> "The question raised in the pertinent cases is not whether coercive pressure is used but how it can be established. In International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed 20 (1947) defendant sought to extend its patent monopoly on machinery by requiring the lessee of the machines to buy only the defendant's salt for use therein, thus depriving the lessee of the right to use other suppliers and foreclosing him from other purchasers. The coercion resulted from the existence of the patented machinery." Capital Temporaries, Inc. of Hartford v. The Olsten Corporation, supra at 662. (emphasis added)

It is apparent from this discussion that the Court in _Capital Temporaries_ inferred coercion from "the existence" of the salt machine patents and not from any independent evidence. Plaintiffs believe that _Capital Temporaries_ did not effectuate any change in existing tie-in doctrine by now requiring explicit pleading and proof of actual coercion. It did not alter the long established principle that coercion can be inferred from the existence of market power and the presence of an established policy of tie-ins.

1. The Supreme Court Decisions On Tie-Ins Confirm That Explicit Individual Evidence Of Coercion Is Not Necessary Where There Is Proof Of Market Power And A Policy Of Tie-Ins.

In order to understand the legal standard of "actual coercion" on which the Court below relies, it is necessary to view _Capital Temporaries_ in light of Supreme Court and Second Circuit cases which inferred or implied coercion from the presence of market power in the tying product and a policy of tie-ins.

The first definitive case on tie-ins as a _per se_ violation of Sherman 1 was _International Salt Company v. United States_, 332 U.S. 392 (1947). As discussed, _supra_, the Supreme Court did not require proof or allegat[illegible]ns of coercion by each individual lessee of the patented salt machine. In fact this contention was dismissed:

> Appellant urges other objections to the summary judgment. The tying clause has not been insisted upon in all leases, nor has it always been enforced when it was included. But these facts do not justify the general use of the restriction which has been admitted here. Id. at 398.

The actual coercion successfully used on the lessees to get them to accept the tie-in was presumed or inferred from first, the market power in the tying market as evidenced by the patent, and secondly, from the existence of the large number of tying arrangements.

In United States v. Paramount Pictures, 334 U.S. 131 (1948) the Supreme Court held that blockbooking, offering one copyrighted desired feature film only on condition an exhibitor take another less desired film, was a *per se* illegal tying arrangement. The actual coercion, or the fact Paramount used its economic power so that the films could not be purchased separately, was found after a trial in the district court where Judge Augustus Hand held "In many cases licenses for all the films had to be accepted in order to obtain any . . ." (United States v. Paramount Pictures, 66 F. Supp. 323, 348 (S.D.N.Y. 1946).

In the instant case it is admitted that the desired Family Buying Power, the tying product, is only sold with the Compact vacuum cleaner, the tied product. (Def. SINDELMAN's Ans. to Plf. Interrog. ¶ 6, I-41)

Standard Oil Company of California v. United States,

337 U.S. 293 (1949) was the next ase in which the Supreme Court affirmed summary judgment for plaintiff United States, finding a per se illegal tie-in. The tie-in condemned here was an exclusive supply contract with independent dealers in petroleum products and accessories. The Court found requisite market power in the existence of the high amount of Standard Oil's gross business. The Court did not discuss the coercion used by Standard Oil on the individual dealers nor did it examine in detail the negotiations surrounding the 8,000 exclusive supply contracts in issue. Rather, the Court presumed the dealers were forced to sign the exclusive dealing clauses because Standard Oil had the leverage to force them by virtue of market power over the tying product (gasoline). The fact that this power was so exercised was inferred from the large number of tie-ins for which there was no benefit to the service station dealer.

> In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one. (cite omitted) The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also. Id. at 306.

In Northern Pacific Railroad Co. v. United States, 356 U.S. 1 (1958) the Supreme Court affirmed summary judgment

in favor of plaintiff United States holding that "preferential routing clauses" in leases and sales contracts requiring lessees to ship by railroad were *per se* illegal tying arrangements. The market power in the tying market necessary to prove an illegal tie-in was found in the existence of some 40 million acres of land held by Northern Pacific. The Court found that Northern Pacific had substantial power by virtue of its landholdings and that it used this power to induce large numbers of leases and sales contracts containing "preferential routing clauses". The Court did not require proof of actual coercion used in obtaining each sales contract or lease but presumed coercion from the existence of a large number of tie-ins and because the lessees had no other reason to want the restrictive clauses. 356 U.S. at 7-8.

The dissenting opinion of Justice Harlan in *Northern Pacific* makes particularly clear that the majority was rejecting the requirement that a plaintiff must explicitly prove actual coercion. Justice Harlan dissented on the ground that although there may be instance when economic coercion can be inferred from the mere existence of the tying arrangement, such as when the vendee suffers detriment, the tying clauses in *Northern Pacific* do not really hurt the vendees so there should be a trial on " . . . whether acceptance of the tying clauses resulted from coercion exercised by appellants through their position in the land

market." 316 U.S. 16. The opinion of Judge Bruchhausen in the instant case seems to go beyond the dissent of Harlan in requiring independent evidence of actual coercion to be explicitly pleaded and proved by plaintiff regardless of the facts of the case.

United States v. Loew's, Incorporated, 371 U.S. 38 (1962) was another tie-in case where the Supreme Court found blockbooking to be *per se* violative of Sherman 1. In *Loew's*, the Court found that the copyright on the films raised a presumption of uniqueness giving the companies the economic leverage necessary to induce customers to take the tied product, the undesirable films. 371 U.S. 45. The district court had found, after trial, that a tie-in existed since the licensing of certain feature films was conditioned on the licensee accepting other films. (See 189 F. Supp. 373). It is significant that for one of the defendants the negotiations were not analysed and the presumption of coercion was accepted by the Supreme Court.

> "Since defendant C & C was found to have had an overall policy of block booking the [district] court did not analyze the particular circumstances of the nine negotiations which had resulted in the licensing of packages of films." United States v. Loew's, Inc., 371 U.S. 38, 101 (1962)

See also United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967).

In the instant case there is a similar "overall policy"

of only selling Family Buying Power and Compact vacuum cleaner together in New York City. In fact during the relevant period in New York City the buying service has never been offered or sold separately. (Def. SINDELMAN's Ans. to Plf. Interrog. Nos. 6, 8, I-41; Ex. D, ¶ 4 in Aff'd. of DOUGLAS ACKERMAN, I-23)[1]

Fortner Enterprises, Inc. v. United States, 394 U.S. 495 (1969) is the latest Supreme Court case defining the standards to apply to find a tying arrangement illegal *per se*. This decision continued the trend in the previously discussed cases making it progressively easier to find requisite market power.

In *Fortner*, the tie-in complained of was that desired loans, the tying product, offered by a subsidiary company, were conditioned on the developer's agreeing to erect a prefabricated house, the tied product, manufactured by the parent company. Like plaintiffs in the instant case, petitioners in *Fortner* complained they were forced to pay artificially high prices for the tied product. The Supreme Court reversed the lower court's finding of summary judgment for defendants and held that if, after trial, there was found to be market power over borrowers in the credit market, the tie-in would be illegal *per se*. The question of actual

[1]The tie was initially arranged by defendant A-T-O's Interstate Engineering Co. in a national agreement with defendant Nationwide Promotions, Inc. (Def. A-T-O Ans. to Interrogatories No. 34(c), unnumbered exhibit.)

coercion used to make the developers agree to take the two products together was not discussed. Rather, it is apparent coercion was inferred from affidavits stating the tying arrangement was accepted only because the credit terms were particularly unique and attractive. 394 U.S. at 504. It seems clear that in Fortner the Supreme Court found genuine issues of fact on the question of market power in the credit market and would infer the tie was coerced if market power were found to exist.[2]

Although the Supreme Court has not explicitly focused on the problem of proof of economic use or coercion in a private class action tie-in case, three recent antitrust decisions, in addition to those cases discussed previously, strongly support the theory that proof of explicit individual

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[2]Indeed, the subsequent district and appellate court decisions in Fortner support this theory. On remand, after a jury trial the judge directed a verdict finding plaintiffs had proved an illegal tie-in *per se*. (Opinion dated November 23, 1970). Again on appeal, the Sixth Circuit Court of Appeals affirmed a tying arrangement had been proved, and that there was a "not insubstantial" amount of interstate commerce, but remanded for jury trial on the issue of economic power in the tying product. 452 F. 2d 1095 (6th Cir. 1971). There was then a trial after which judgment was entered for plaintiffs finding an illegal tie-in *per se*. (Opinion dated September 19, 1974, Civil Action No. 4392-6, W.D. Kentucky). This illegal tie-in was found to exist despite the court's finding of fact that Mr. Fortner "willingly" entered into the tying arrangement! (Opinion dated September 19, 1974, page 8, ¶ 13) (copy furnished herewith) Apparently this finding had been approved earlier by the Circuit Court. (See opinion, page 35, ¶ 1)

coercion in all cases is not required, and that proof of individual coercion is but one means of proving economic power exists and has been used. Federal Trade Commission v. Texaco, Inc., 393 U.S. 223 (1968), addressed the question of whether Texaco had engaged in an "unfair method of competition" under §5 of the Federal Trade Commission Act when it undertook to induce its service station dealers to purchase Goodrich tires, batteries, and accessories ("TBA") in return for a commission paid by Goodrich to Texaco.[3] The Commission found that the Texaco-Goodrich arrangement violated §5, but the Court of Appeals reversed finding that the Commission had failed to establish that Texaco had exercised its dominant economic power over its dealers or that the arrangement had an adverse effect on competition. 336 F. 2d 754 (D.C. Cir. 1964) The Supreme Court had no problem in finding that Texaco held dominant economic power over its dealers. Mr. Justice Black, speaking for the Court stated:

> "The average dealer is a man of limited means who has what is for him a sizable investment in his station. He stands to lose much

[3] Tying arrangements may be declared illegal under Section I of the Sherman Act, 15 U.S.C. §1 (1958), or under Section 3 of the Clayton Act, 15 U.S.C. §14 (1958), or under Section 5 of the Federal Trade Commission Act, 15 U.S.C. §41 (1958). Although a violation of §5 of the F.T.C.A. may be merely an incipient antitrust violation requiring a lesser standard than under Sherman Act §1 its quasi-tying analysis tracks the requirements of traditional tying cases.

> if he incurs the ill will of Texaco. As Judge Wisdom wrote in Shell, 'A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord.'"
> 393 U.S. at 227.

The Court then viewed the sales-arrangement "against the background of this dominant economic power over the dealers" (393 U.S. at 227), and found a §5 violation holding:

> While the evidence in the present case fails to establish the kind of overt coercive acts shown in Atlantic, we think it clear nonetheless that Texaco's dominant economic power was used in a manner which tended to foreclose competition in the marketing of TBA. [Goodrich] The sales-commission system for marketing TBA is inherently coercive. (emphasis added) 393 U.S. at 229.

Texaco is relevant to the instant case because the Supreme Court took cognizance of the unequal bargaining power of the parties and found coercion to be inherent.

The Supreme Court's strong policy in favor of private antitrust litigation is another factor negating a major focus on individual proof of coercion. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) was a treble damage suit by dealers who operated Midas Muffler Shops under franchises granted by Midas, Inc. The complaint alleged unlawful tying as well as other antitrust violations. The Court of Appeals held the suit barred because franchises were in *pari delicto*, having sought to acquire the franchise

with full knowledge of the restrictions and having profited therefrom. The Supreme Court reversed, emphasizing "the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." 392 U.S. at 138. Justice Black noted:

> Both Simpson and Kiefer-Stewart were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. . . . Although petitioners may be subject to criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. . . . Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business.
> 392 U.S. at 139, 140 (emphasis added)

This case illustrates that in private antitrust actions courts must focus not only on injury to individual plaintiffs but on the effect on competitors in the tied product,

and hence to the economy as a whole.[4] More important for the instant case, Perma Life Muffler appears to go beyond Texaco, which found implicit coercion, finding that anti-competitive conduct may exist in the absence of coercion, even where the franchisees voluntarily acquiesce in the practices which constitute antitrust violations. Mr. Justice White observed in a concurring opinion:

> "When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of §4, since it will deter those most likely to be responsible for organizing forbidden schemes." 392 U.S. at 145. (emphasis added).

The foregoing discussion of Supreme Court cases shows that although the Supreme Court has not focused on explicit proof of individual coercion, it has inferred coercion

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[4]See Turner, "The Validity of Tying Arrangements Under the Antitrust Laws", 72 Harv. L. Rev. 50, 60 (1968)

> ". . . [T]he interest of buyers is not only legitimate interest at stake. The [Supreme] Court has shown at least equal concern, and in later cases perhaps primary concern, with the interest of competiting suppliers of the tied product in free access to the consuming market - a strong desire that competition in the sale of each product be 'on the merits' ".

where the seller has economic power in the tying product and there is a policy of tying, a large number of ties effected, or an inherently coercive marketing situation involving unequal bargaining power. In fact, the Perma Life Muffler decision indicated that proof of individual coercion may never be necessary when the other elements of an anti-trust violation are shown.

2. The Second Circuit Tie-In Decisions Subsequent To Fortner, Including Capital Temporaries, Are Consistent With Supreme Court Standards.

Judge Bruchhausen's decision dismissing this case was apparently based on a belief that Capital Temporaries significantly changed the proof necessary to establish an illegal tie-in.

In the first opinion in the instant case, dated June 19, 1974, Judge Bruchhausen, relying on Fortner Enterprises Inc. v. United States Steel, supra, found that the plaintiffs herein had alleged facts which, if proved at trial, would constitute a per se illegal tying arrangement. (Opinion, p. 8, I-30) The opinion on March 5, 1975 (I-83), dismissing the complaint herein, states plaintiffs allege no "actual coercion" by salesman thereby rendering their claim of an unlawful tying arrangement fatally deficient under Capital Temporaries, decided on October 17, 1974, subsequent to the original decision upholding plaintiffs' action. This second opinion must necessarily interpret Capital Temporaries

as requiring more rigorous, more explicit, and more independent proof of actual coercion than Fortner. This interpretation is incorrect.

The Second Circuit tie-in cases subsequent to Fortner are not inconsistent with the standards set down by the Supreme Court. Nor do they require more specific pleading or explicit proof of coercion. The requirement that a tie actually exists, i.e., proof that a purchaser has actually been coerced or induced into taking the two products together, has always been present. Explicit proof of coercion has been required only where the seller has no policy of tying the two products together.

American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, 446 F. 2d 1131 (2d Circuit 1971) cert. denied 404 U.S. 1063 (1972) is not at variance with prior tie-in cases. The anti-trust claim in this action was that defendant ABC exerted unlawful economic pressure on the plaintiffs (Kemper) to get him to agree to sponsor the Evening Report over local stations as a condition to being permitted to sponsor broadcasts over other local affiliates of ABC whose sponsorship was desirable. Originally Judge Tenney in the district court granted summary judgment to defendants dismissing the complaint on two grounds. First, he found that the alleged tie did not consist of two separate and distinct commodities as defined in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953),

but rather the program and its distribution or broadcast constituted one inseparable product. Secondly, he found, after a lengthy discussion of the detailed negotiations, that the plaintiff failed to prove a "forced purchase". This finding, however, was made with an important distinction:

> <u>It is important to note that this is not a case of an outright refusal to sell a tying product unless the tied product is also purchased</u>. The alleged tie-in was accomplished, according to the complaint (¶ 27), not by a refusal to sell less than 130 stations but was "effected by ABC informing Kemper that it would charge a rate for the broadcast time on the 95 desired stations that far exceeded the rate for the broadcast time on the total of 130 stations which included both the desired 95 stations and the undesired 35 stations." <u>American Manufacturers Mutual Insurance Co. v. American Broadcasting Paramount Theatres</u>, 270 F. Supp. 619, 646. (emphasis added)

The Court then examined the package price differentials complained of and found the contract rates were based on valid criteria. 270 F. Supp. at 648. This decision was then appealed to the Second Circuit Court of Appeals, 388 F. 2d 272, which reversed the district court's award of summary judgment to defendants and remanded for a trial on the merits. The Court of Appeals found that there were genuine questions of fact as to whether the Kemper-ABC transaction concerned a single product for the purpose of a tie-in analysis and on the issue of coercion the question

of whether there were justified cost differentials between ABC's individual and package prices. It is significant that the Court's opinion carefully limited extensive examination of the coercion involved in negotiations to cases where there is no clear inflexible policy concerning the tie.

> Judge Tenney seems to suggest that Kemper had a duty to approach the hierarchy of officialdom at ABC's New York office with respect to a discount on its selected lineup, and should not have been content to accept the rejection it received from the lower echelon in the network's Chicago sales office. <u>But the law does not demand that Kemper joust with windmills; it would have been reasonable to require it to negotiate only if there was a chance of success.</u> 388 F. 2d at 284 (emphasis added)

The district court, on remand, held a hearing on the single issue of whether it was reasonable for Kemper not to have attempted to negotiate further. Judge Tenney made a finding of fact that Kemper "acted unreasonably in failing to negotiate further with ABC in this regard after May 18, 1962" 446 F. 2d 1131, 1133. This decision was appealed and the Second Circuit Court of Appeals affirmed. 446 F. 2d 1131 (1971). It is significant that unlike the instant case, where the tying arrangement is a firm policy, the Court of Appeals in its second opinion in <u>American Manufacturers</u> found there was no ABC policy of tying desired stations to the undesired ones. 446 F. 2d at 1135. Neither was there a large number of tied transactions.

This view of the coercion requirement in American Manufacturers was endorsed by Judge Richard McLaren in McMackin v. Schwinn Bicycle Co., 1972 Trade Cases, ¶ 74,220 (N.D. Ill. 1972) vacated on other grounds 1974-1 Trade Cases ¶ 75,047 (N.D. Ill. 1974)

> "This Court is persuaded that acceptance of a burdensome tie-in by an appreciable number of buyers within the market permits an inference of coercion and that the decisions in Fortner on remand and in American Mfrs. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., (1971 Trade Cases par. 73,659, 446 F. 2d 1131, 1137, 2d Cir., 1971, cert. denied, 404 U.S. 1063, 1972) are distinguishable since there was no consideration of acceptance by an appreciable number of buyers in those cases." 1972 Trade Cases at 93,020.

Thus, under American Manufacturers the requirement of explicit proof of actual coercion, or independent evidence of successful pressure by a seller with market power in the tying market arises only when there is no policy or widespread practice of tying the two products together.

Another Second Circuit case fully supporting this theory is Coniglio v. Highwood Services, Inc., 495 F. 2d 1286, (2d Cir. 1971). This was an action by a season ticketholder to the Buffalo Bills football games, representing a class of some 23,000 Bills season ticketholders. The plaintiffs claimed an illegal tying arrangement whereby season ticketholders, in order to buy season tickets, had to agree

to purchase tickets for exhibition games. The Court found sufficient economic power in the tying market to coerce purchase of the tied product by virtue of the fact certain advantages were accorded to the season ticketholder. The Court of Appeals in Coniglio had no difficulty in implicitly finding the economic power had been used on the season ticketholders. The Court did not require Coniglio and the 23,000 member class to allege they were actually coerced into buying both tickets but presumed coercion had been used as evidenced by the large number of ties and defendants' acknowledged policy to tie the two items.

> Here, however, the buyer is not "free to take either product [season ticket or exhibition game ticket] by itself." Indeed, it is undisputed that a season ticket could not be purchased unless a certain number of exhibition game tickets, three in 1970, were purchased as well. Id. at 1290.

The Court of Appeals in Coniglio affirmed the dismissal of the complaint on a different basis, however, holding that no illegal tie-in could exist where competition in the tied market (exhibition tickets) could not be restrained or foreclosed by the tie as there already existed a natural monopoly over the presentation of exhibition games. This, of course, is not a problem in the instant case as the Compact vacuum cleaners have many competitors (Aff'd. of BARRY FREDERICKS, Aff'd. of ROBERT LIMACHER, Ex. E, I-22).

In his opinion of March 5, 1975, Judge Bruchhausen cited Margaret M. Landon v. Twentieth Century-Fox Film Corporation, 384 F. Supp. 450 (S.D.N.Y. 1974), as well as Capital Temporaries for the proposition that actual coercion by the seller must be explicitly shown. In this case, the author plaintiff alleged an unlawful tying arrangement in Fox's requirement that Fox acquire the renewal copyright as a condition to its purchase of the original copyright. The Court found there was no illegal tying arrangement. This decision, like Capital Temporaries, is easily distinguished from the instant case.[5] In neither case was there probably even a genuine tie as there was no evidence in Capital Temporaries that the white collar franchise would be sold only with the blue collar,[6] and there was no evidence in Margaret Landon that Fox conditioned buying the original copyright on also getting the renewal copyright.[7] Further-

[5]The unusual facts in Margaret Landon included the unsupported allegation of the reverse of a normal tie-in relation - the buyer was argued to be the party imposing a tie-in through illegal use of economic power against the seller. The plaintiff seller first raised her dubious tie-in claim 20 years after the sale. These aspects alone serve to distinguish the case from almost all tie-in cases.

[6]The Court of Appeals in Capital Temporaries referred to the plaintiffs' allegations as, at best, an "ersatz tie". 506 F. 2d at 658.

[7]In Margaret Landon, the plaintiff indicated that there was no discussion "at all" on the subject of copyright renewals when the contract was negotiated. Therefore, there was no basis for the Court to find Fox coerced plaintiff into selling the rights.

more in neither case was there an allegation of a widespread tying policy or a large number of tying arrangement from which coercion could be inferred.

3. Other Courts Have Rejected A Requirement Of Proof Of Individual Coercion As An Independent Element Of Every Illegal Tie-In.

The Second Circuit cases discussed above show that individual coercion is not required to prove every illegal tie-in but rather that coercion will be inferred when there is sufficient economic power in the tying product, a widespread policy of tying, or a large number of ties. This view is consistent with decisions in other jurisdictions. All decisions relevant to the individual coercion requirement in tie-in cases are analysed at length in a recent 158 page opinion, Ungar v. Dunkin Donuts of America, 1975 Trade Cases, ¶ 60,204 at p. 65,731 (E.D. Penn., March 12, 1975). This case is now on appeal in the Third Circuit Court of Appeals. This opinion responds to a class action motion by franchisees who claimed that Dunkin Donuts conditioned sale of a Dunkin Donuts franchise on an agreement franchisees buy from or through Dunkin Donuts the extensive equipment and supplies necessary to operate the franchise. As in the present case, the franchisees in Ungar claim damages in that the tying arrangement forced them to pay higher prices for the tied products. Judge Becker dealt at length with the requirement of proof of use of economic power or coercion in

tie-in cases and concluded that proof of individual coercion was not necessary to prove an illegal tie-in. The opinion traces the coercion doctrine in lower federal courts, noting that the question of coercion has most frequently arisen in franchise cases where class-action certification is sought.[8] In suits of this type the franchisor generally asserts the alleged tie was voluntarily acquiesced in by the franchisee making proof of coercion of each class member necessary and mitigating against class action determination.

Judge Becker in Ungar went far beyond finding coercion implicit in certain tying arrangements, holding that even a "voluntary" tie could be illegal.

> "The thrust of the individual coercion doctrine is that the plaintiffs must prove that each of them did not take the tied product willingly. The advocates of the doctrine do not explain whether the willingness standard is a subjective one depending upon the state of mind of each franchisee. . . . We conclude that there can be an antitrust violation where

[8] See Abercrombie v. Lum's Inc., 345 F. Supp. 387 (S.D. Fla. 1972); McMackin v. Schwinn Bicycle Co. 1972, 1974-1 Trade Cases, ¶75,047 (N.D. Ill. 1974); Lah v. Shell Oil Co., 50 FRD 148 (S.D. Ohio 1970); Bogosian v. Gulf Oil Corp., 62 FRD 124 (E.D. Penn., 1973); Siegal v. Chicken Delight, 448 F. 2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972); Smith v. Denny's Restaurants, Inc., 62 FRD 459 (N.D. Calif. 1974). For analysis of these cases see 1975 Trade Cases 65,751 et. seq.

the franchisee takes voluntarily and with knowledge of the uneconomic nature of the tie."

. . . An additional basis for rejection of the individual coercion doctrine is the almost metaphysical analysis which would be required if we were to adopt it; courts would be obliged to parse the human personality in the most sophisticated terms in an effort to determine the franchisee's state of mind vis-a-vis the putative (and ill-defined) coercion standards." Ungar v. Dunkin Donuts of America, supra at p. 65,762.

The Court further noted:

"The willing but ignorant buyer must be deemed indirectly and subjectively coerced since, in the defendant's parlance, a rational man would presumably not take an uneconomic tie unless he was coerced or deceived." Id. at p. 65,763, footnote 41.

Judge Becker concluded that proof of individual coercion is but one means of proving use of economic power.

"If a franchisor who possesses the requisite economic power coerces the franchisee in such a manner as to restrain competition in the tied product, A Fortiori he has used his economic power. This, then, establishes the necessary nexus between economic power in the tying product and the restraint of competition in the tied product." Id. at p. 65,765.

The court found proof of individual coercion unnecessary when the use of economic power could be established by proof

of a firm company policy, acceptance by large number of buyers of a burdensome or uneconomic tie, and an unequal bargaining relationship between the parties. Id. at p. 65,765.

4. The Evidence Submitted By Plaintiffs Mandates An Inference Of Coercion.

Judge Bruchhausen, in his opinion dismissing the complaint, stated:

> ". . . the affidavits of the plaintiffs, Hill, Rutherford, Lewis, Raphael and Lindo allege absolutely no coercion by the salesman who sold them the item." (p. 4, I-83)

What the district court appears to require is that each plaintiff detail a lengthy negotiation session with the door-to-door salesman attempting to get the salesman to let them purchase a membership in Family Buyer Power without having to purchase the Compact vacuum cleaner. An additional requirement would be proof that the buyer finally "gave in" and was coerced by the economic power of the tying product. This requirement is erroneous and misconstrues Capital Temporaries. Effective use of economic power i.e., actual coercion is shown by or is inferred from the uniform company policy to only sell the two products together, set sales presentations, and the large number of ties effected. Moreover, coercion is inherent in the tying arrangement given the unequal bargaining power of the parties and its detriment to plaintiffs.

It is clear in this case that defendants herein possessed the requisite economic power from which coercion could be inferred. In his opinion dated June 19, 1974 (I-30) Judge Bruchhausen found that the plaintiffs herein set forth facts, which, if proved, would fulfill the requirement of market power over the tying product. Although economic power in the tying product is not, therefore, an issue on appeal the extraordinary uniqueness, attractiveness and desirability of Family Buying Power to plaintiffs provides a setting that is "inherently coercive". (F.T.C. v. Texaco, supra at 229). Proof that the seller possesses sufficient economic power in the tying product to appreciably restrain competition in the tied product has long been a requirement of a per se illegal tie-in. The proof of sufficient economic power has evolved from market dominance (Standard Oil) to distinctiveness in Northern Pacific, to permitted "inference of economic power merely from the tying products desirability to the consumer" in Loew's. Finally, Fortner made it easier to show power in the tying market, by allowing varied kinds of evidence, such as proof that an appreciable number of buyers may have accepted a burdensome term such as a tie-in or simply an inference from the fact buyers were willing to pay a higher than competitive prices for the tied product. (394 U.S. at 504).

The evidence submitted to the district court established defendants' economic power by showing their market dominance

and by demonstrating the uniqueness and desirability of the tying product, Family Buying Power.

Compact has an exclusive franchise to sell Family Buying Power memberships in the New York area. (Amended Compl. ¶19, I-19; Aff'd. of DOUGLAS ACKERMAN, Ex. B, I-23). FBP is a nationwide buying service through which members can supposedly obtain substantial discounts on a wide variety of merchandise. Plaintiffs were told they could obtain virtually all consumer items at wholesale prices through FBP and save thousands of dollars. (Amended Compl. ¶3, I-19; Aff'd. of DOUGLAS ACKERMAN, Ex. D-F, I-23; Def. SINDELMAN's Ans. to Plf. Interrog. No. 34, I-41). Plaintiffs alleged defendants had sufficient economic power in the consumer buying service market. FBP's attorney stated that "defendant could not conceivably exercise market dominance over the buying serice . . . since there are over thirty buying services listed in the Manhattan Telephone Directory alone and clearly some of the buying services listed are so large that the FBP defendants must be considered an insignificant factor in their field . . ." (Aff'd. of B. BLUMBERG, ¶10b, I-56).

Plaintiffs' attorney made a study of the buying services listed as competitors by defendant Sindelman (Aff'd. of Def. SINDELMAN, Ex. C, I-27) the results of which were submitted in opposition to defendants' motions for summary judgment. (See Affidavits of A. BENTLEY and F. STELLA, I-64).

The results of this study show that none of the buying services listed by defendants were genuine competitors to FBP.

Since FBP, according to the evidence before the district court at the time of the motion for summary judgment, was apparently the only general consumer buying service offered for sale in the New York market, its economic power surpasses market dominance and approaches that of a clear monopoly. The defendants' market power was enough so that the buyer could "be forced to accept the higher price [of the provacuum] because of their stronger preferences for the product [the buying service], and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product." Fortner, 394 U.S. at 504.

Another test for sufficient economic power that FBP satisfies is the "uniqueness" test as defined in Loew's and Fortner.

> "Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, e.g., International Salt; Loew's, or physical, as when the product is land, e.g. Northern Pacific. It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat

> confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." Fortner, 394 U.S. at 505, footnote 2.

The buying service's uniqueness arises not only from its many supposed desirable attributes, but also from the fact it was offered free. "We give away free of charge a one year membership in FBP." (Aff'd. of Def. SINDELMAN, ¶2, I-27). Even if a competitor could develop a buying service with the same components as FBP, it could not afford to match the price. Obviously if a service is offered for free there is no way the competitors could undercut the price.

An additional aspect of FBP's uniqueness is that it could afford to make extravagant representations which no other competitor could possibly match because it had no intention of backing up its promises. When plaintiff CHERYL PERRY HILL's FBP literature arrived, she found it was not at all as represented. (Aff'd. of Plf. HILL, ¶9, I-64). Plaintiff ANSONIA LEWIS's attempts to use the program to buy tires, a fan, and dishes were futile. (Aff'd. of Plf. LEWIS, ¶5, I-64). Because this buying service is a fraud [Amended Compl. ¶31, 32, I-19] there is a legal barrier against other competitors in the vacuum cleaner market offering it themselves.[9]

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[9] A further legal barrier results from the fact that sales of both FBP memberships and Compact vacuums were the exclusive New York City right of the Compact defendants, no competitor could legally duplicate the tied package.

Just as it would be illegal for a competitor to duplicate a patented or copyrighted product it would be illegal to duplicate a fraudulent service.

Even if the buying plan is not in fact unique the impression of uniqueness was created in the minds of the consumers by salesmen who represented that the buying plan was "unique" and "copyrighted" (Amended Compl. ¶25, I-19; Aff'd. of ACKERMAN, Ex. C, I-23; Def. DORTCH Ans. to Plf. Interrog. No. 84, I-74; Def. SINDELMAN Ans. to Plf. Interrog. No. 54, I-41) and would save consumers many times the cost of the vacuum cleaner. (Amended Compl. ¶31(d), I-19). Since plaintiffs were told that the buying plan was "free" (Amended Compl. ¶31(b), I-19), and were not told of its real cost, they may well have assumed that a majority of the $399.95 purchase price for the vacuum cleaner was in reality a hidden charge for the plan.[10] Unlike a promotional "give-away" -- for example, the free appliances given by banks to attract depositors -- the buying plan membership does not have an easily quantifiable value and its real cost was never revealed to the purchaser, who was led to believe that it was worth far more than the $12.50 which the Compact defendants paid FBP for it. (Amended Compl. ¶31(d),

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[10]The set sales presentation represented FBP as very valuable (Aff'd. of DOUGLAS ACKERMAN, Ex. D-F, I-23). At least one salesman stated that FBP was selling for $360.00 outside of the New York area. (Plf. motion to reargue, transcript of tape recording of sales presentation, p. 16, I-84).

I-19).[11]

More proof of defendants' economic power comes from the existence of the large number of tying arrangements -- New York area sales totals amount to about 14,813 for the relevant period starting November 1, 1967 and ending July 31, 1974. (Def. SINDELMAN's Ans. to Plf. Interrog., Ex. A, I-41). The fact that such a large number of people made contracts which were so clearly unfavorable to then, namely requiring them to pay up to more than $500.00 for a $90 vacuum cleaner package is further evidence of the economic power of the buying service.[12]

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[11] It is misleading, moreover, to compare the cost of the buying plan memberships to the Compact defendants with the final price of the package. The comparison between the cost to the Compact defendants of the vacuum cleaners and of the buying plan is more significant. The wholesale cost of the vacuum cleaner ranges from $50 to $67, depending on the number purchased. The polisher attachment costs $14. (Affidavit of DOUGLAS V. ACKERMAN, sworn to May 20, 1974, ¶13, I-23). Thus the cost of each buying plan to the Compact defendants no doubt exceeded 15% of the cost of the cleaner-polisher.

[12] The sales contracts of four of the named plaintiffs each recite a cash price of $399.95, plus sales tax of $28 or $24 plus finance charges ranging between $83 and $123.40, depending on downpayment and length of repayment (Contracts of plaintiffs LINDO, RAPHAEL, RUTHERFORD and LEWIS, SINDELMAN Aff'd., Exs. B-2 to B-5, I-13). The somewhat earlier contract of plaintiff HILL originally stated a 1969 cash price of $359.95, reduced by allowance of "$90.00 for return of waxer and trade-in" of G.E. cleaner. (SINDELMAN Aff'd., Ex. B-1, I-13). Thus, the maximum deferred payment price for these consumers was $555.35. Defendant SINDELMAN has stated Compact Electra "sells this equipment mostly to consumers who in most instances purchase the same on credit." (SINDELMAN Aff'd. ¶3, I-13).

In the buying situation thus described it is unreasonable to require the buyers to question the salesmen's representations that Family Buying Power cannot be bought separately in New York. The Compact defendants admit that the individual salesmen are furnished set pattern "sales talks", a copy of which is contained in the record. (Def. SINDELMAN Ans. to Plf. Interrog. Nos. 6, 7, 8, I-41; Aff'd. of DOUGLAS ACKERMAN, Ex. D-F, I-23).[13]

Plaintiffs have set forth in the record overwhelming proof that the economic power possessed by defendants was used on plaintiffs to effect the tying arrangement. Actual coercion is amply shown by the unequal bargaining power of the parties, the large number of ties effected, that the tying arrangement is economically detrimental to plaintiffs, the company policy to only sell the two products together and set sales presentations. Moreover, coercion is implicit in the economic power of the buying service which is represented as very valuable. For the summary judgment motion defendants did not come forward with any competitor of this unique buying service in the New York area.

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[13] As Judge Bruchhausen granted plaintiffs' class action motion under Federal Rules of Civil Procedure 23(b)(3) he necessarily found that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. (I-72). This implicit finding that all class members were subjected to the same coercive pressure further negates requiring explicit allegations of individual coercion.

It is clear that Judge Bruchhausen's interpretation of the coercion standard in Capital Temporaries was not properly applied in the instant case. Coercion is implicit not only in the selling arrangement but in the fact the defendants accomplished the very economic evil the Sherman Act seeks to prevent:

> "They (ties) deny competitors free access to the market for the tied product, not because the party imposing the tying arrangement has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products." Northern Pacific, 356 U.S. at 6.

B. The Court Below Erred In Finding That There Was No Genuine Issue Of Fact As To Whether Plaintiffs Were Actually Coerced Into The Tying Arrangement.

Even assuming, arguendo, that Judge Bruchhausen was correct in finding that plaintiffs must explicitly allege and prove actual individual coercion, the complaint, 9(g) statement and affidavits submitted show plaintiffs fulfilled this requirement. Unlike Zessos, the individual plaintiff in Capital Temporaries, plaintiffs have shown that they were desirous of obtaining only Family Buying Power and unwillingly purchased the vacuum cleaner to get it. Unlike the contract in Capital Temporaries, here we have unambiguous contracts imposing the tie-in, which Compact defendants acknowledge was imposed by them on a consistent basis.

Although prior to their motion to amend plaintiffs had not used the word "coercion" itself, surely the test of <u>Capital Temporaries</u> is a factual one and not a matter of semantics. Plaintiffs submit that the jury could find that coercion is present herein from the following facts:

*The Compact defendants inextricably linked Family Buying Power membership to purchase of the vacuum cleaner -- it was never sold or given away separately. (Def. SINDELMAN Ans. to Plf. Interrog. Nos. 6, 7, 8, I-41).

*Plaintiffs and their class "would have purchased only the plan if informed of its $12.50 price and allowed to purchase it separately . . ." (Amended Compl. ¶25, I-19).

*Plaintiffs have been damaged by the tie-in in that they have been forced to pay artificially inflated prices for inferior goods <u>which they would not have purchased</u> had not the tie-in been imposed." (Amended Compl. ¶27, I-19) (emphasis added).

*"If Family Buying Power had not been included as part of the sale, I [plaintiff HILL] would not have bought the Compact vacuum cleaner. When I bought the Compact, I already owned a General Electric vacuum cleaner which worked quite well. I was not shopping or looking for a new vacuum cleaner." (Aff'd. of Plf. HILL, ¶5, attached to Aff'd. of ALLEN BENTLEY, I-64).

*"In a sales presentation which lasted an hour or more, he [the Compact salesman] discussed membership in a nationwide buying service called Family Buying Power, which was available only from Compact . . . He claimed that tremendous savings were available to FBP members, that I could only get FBP membership if I bought the vacuum cleaner. . . . I already had an upright vacuum cleaner which was quite satisfactory. I was not shopping for or considering buying a new one." (Aff'd. of Plf. RAPHAEL, ¶¶ 2, 6, attached to Aff'd. of ALLEN BENTLEY, I-64).

*"I was just married and needed to buy many things so I thought my savings [using FBP] would be substantial. I have never heard of anything like FBP and had no idea of whether any similar buying service might be available to me. The salesman said FBP was only available to people who bought the Compact vacuum cleaner, in which case it was included without charge. <u>If I could have bought FBP separately, I would not have bought the vacuum cleaner</u>. . . . I already had an adequate canister vacuum cleaner and was not at all in the market for a new vacuum cleaner." (Aff'd. of Plf. LEWIS, ¶¶ 3, 4 attached to Aff'd. of ALLEN BENTLEY, I-64) (emphasis added).

*"Did the defendants, whether because their service was unique or because plaintiffs were unaware of any alternatives to it, have sufficient market power in the buying service market to distort the free market in vacuum

cleaners by requiring purchase of the Compact vacuum cleaner as a precondition of obtaining membership in the buying service?" (Plfs.' 9(g) statement, ¶4, attached to Aff'd. of ALLEN BENTLEY, I-64).

*Family Buying Power was represented to consumers as "unique". (Ex. C to Aff'd. of DOUGLAS ACKERMAN, I-23) and using "copyrighted procedures" (Def. SINDELMAN Ans. to Plf. Interrog., No. 52, I-41, referring to Ex. A, p. 17 of the Interrogatory, I-39).

The affidavits of the individual plaintiffs in this action go much further in proving actual coercion than the rather mild affidavit accepted by the Supreme Court in Fortner. In that case, sufficient coercion or forced purchase was adduced from the statement of A.B. Fortner that "he accepted the tying condition on respondents' loan solely because the offer to provide 100% financing, lending an amount equal to the full purchase price of the land to be acquired, was unusually and uniquely advantageous to him." 394 U.S. at 504 (emphasis added).

Even if the facts set forth do not conclusively prove plaintiffs were coerced they at least raise genuine issues of fact making the case inappropriate for summary judgment. It is well settled in this circuit that summary judgment can be granted only if there is no genuine dispute as to any material fact, and that this requirement is to be strictly construed so as to ensure that factual issues will not

be determined without the benefit of a trial.

Thus in Colby v. Klune, 178 F. 2d 872 (2d Cir. 1949) the court in reversing the district court's granting of a motion for summary judgment pointed out that

> "Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common law system." Id. at 873.

It is "a maxim that the court, on a motion for summary judgment, cannot *try* issues of fact but can only determine whether there *are* issues of fact to be tried; and once having determined this affirmatively must leave those issues for determination at a trial." Empire Electronics v. United States, 311 F. 2d 175, 179 (2d Cir. 1962). Summary judgment is particularly inappropriate where, as here, "the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feeling or reactions," Empire Electronics v. United States, supra at 180. Because "coercion" involves not only objective criteria but subjective feeling in the mind of a purchaser it is hard to imagine a fact more inappropriate for resolution in a summary judgment motion.

> "The impact of particular circumstances upon an inference arising from an admitted existing factual situation calls for a factual determination which is the function of the trier of facts and not that of the court in disposing of

a motion for summary judgment. . . . A judge may not, on a motion for summary judgment, draw fact inferences." Bragen v. Hudson County News Co., 278 F. 2d 615, 618 (2d Cir. 1960).

See also Bozant v. Bank of New York, 156 F. 2d 787 (2d Cir. 1946); Friedman v. Meyers, 482 F. 2d 435 (2d Cir. 1973); Cali v. Eastern Airlines, Inc., 442 F. 2d 65 (2d Cir. 1971); Subin v. Goldsmith, 224 F. 2d 753 (2d Cir. 1955) cert. denied 350 U.S. 883; Schwartz v. Associated Musicians, 340 F. 2d 228 (2d Cir. 1964).

Moreover, it is well established that the burden of showing the absence of such an issue of fact rests with the party seeking summary judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Where competing inferences can be drawn from underlying factual material "the inferences . . . must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (reversing summary judgment in an anti-trust suit). This standard has been consistently followed in this Circuit. American Manufacturers Mutual Insurance Company v. American Broadcasting-Paramount Theatres, Inc., 388 F. 2d 272 (2d Cir. 1967); Shinabarger v. United Aircraft Corp., 381 F. 2d 808 (2d Cir. 1967); Entin v. City of Bristol, 368 F. 2d 695 (2d Cir. 1966).

The standard which applies to the use of summary judgment in complex antitrust litigation is even stricter than in other cases as was recognized by the Court below in

its opinion of June 19, 1974, at p. 8 (I-30).

> [S]ummary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

The above language was quoted from the decision of the Supreme Court in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). That this principle is fully applicable where the alleged antitrust violation is a tying arrangement may be stated on highest authority: Poller was cited with approval in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 500, (1969), in which the Supreme Court reversed the granting of summary judgment for defendants in a tie-in case.

See also White Motor Co. v. United States, 372 U.S. 253 (1973); Radiant Burners, Inc. v. People's Gas Light & Coke Company, 364 U.S. 656 (1961); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

A case directly on point with the instant case is the first Second Circuit opinion in American Manufacturers Mutual Insurance Company v. American Broadcasting-Paramount Theatres,

Inc., 388 F. 2d 272 (2d Cir. 1967). The Court held that there should be a trial on the issue of coercion as

> "If all the inferences are resolved in favor of Kemper - as we are required to do on ABC's motion for summary judgment, United States v. Diebold, supra, - we believe that on the record before us it is a disputed issue of fact whether, under all the circumstances of the case, it was reasonable to have required Kemper to attempt to negotiate further after ABC rejected its order". Id. at 285.

Similarly, if all inferences in the instant case are resolved in favor of plaintiffs, there is at least a genuine issue of fact as to whether or not they were "actually coerced" into the tying arrangement. The factual differences between plaintiffs and defendants must be resolved by the jury rather than being prematurely disposed of on a motion for summary judgment.

POINT II

THE COURT BELOW ERRED IN DENYING PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT AND 9(g) STATEMENT AND TO SUBMIT ADDITIONAL EVIDENCE

After Judge Bruchausen dismissed the complaint herein, plaintiffs promptly moved for leave (1) to amend the complaint and 9(g) statement to make additional specific detailed allegations of coercion in imposing the tie-in, and (2) to reargue and submit additional evidence. (Motion, I-84) These motions were denied in a decision dated April 5, 1975. Plaintiffs submit this decision was an abuse of discretion given the exceedingly liberal case law as to amendment of pleadings, the present state of the antitrust law of tie-ins, and the significant evidence of a tie-in both in the record at the time and in the additional evidence adduced on these final motions.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend pleadings "shall be freely given when justice so requires." This liberal amendment rule has been confirmed in innumerable court decisions. See, e.g. Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964); Roloff v. Arabian American Oil Co., 421 F. 2d 240 (2d Cir. 1970).

In Foman v. Davis, 371 U.S. 178, 182 (1962), the Supreme Court set out the standard for consideration of motions for leave to amend:

> If the underlying facts or circumstances relied upon by a

> plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be "freely given."

Free amendment of pleadings in such instances has long been the rule in the Second Circuit. As far back as Rossiter v. Vogel, 134 F. 2d 908, 912 (2nd Cir., 1943) the Court held "That where facts appear in affidavits upon motion for a summary judgment which would justify an amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment." Downey v. Palmer, 2 Cir., 114 F. 2d 116; cf. Seaboard Terminals Corp. v. Standard Oil Co. of N. J., 2 Cir., 104 F. 2d 659.

In this case there was no "apparent or declared reason" to deny plaintiffs an opportunity to test their claims on the merits.[14] There was no undue delay. Plaintiffs were

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[14] Leave to amend may properly be granted after dismissal in the sound discretion of the Court. See, e.g., Markert v. Swift & Co., 173 F. 2d 517 (2d Cir. 1949); Swan v. Board of Higher Education, 319 F. 2d 56, 61 (2d Cir. 1963); Christophides v. Porco, 289 F. Supp. 403 (S.D.N.Y. 1968). In fact, dismissing for failure to state a claim without granting leave to amend has been held to be erroneous "unless the court determined that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Bonanno v. Thomas, 309 F. 2d 320, 322 (9th

faced with the need to amend only after the district court's decision on defendants' motions for reargument of summary judgment. For the same reason, there could have been no bad faith or dilatory motive on the part of the plaintiffs. Although plaintiffs had previously amended once as of right, there was no repeated failure to cure deficiencies by amendments previously allowed. Neither would there have been any undue prejudice to defendants in allowing amendment. The amendment plaintiffs sought would not have stated a new or different cause of action but would merely have clarified pre-existing claim on the alleged tie-in in the light of the district court's new application of the legal standard of the Capital Temporaries decision. Defendants would have been put to no additional burden by allowing amendment. They had already fully briefed the significance of the Capital Temporaries decision.

Finally, there was no other reason to justify denial of leave to amend in this case. In fact, this appears to be the ideal case in which to allow amendment. Plaintiffs diligently prosecuted claims which were sustained until the

14 (fn. cont'd.) - Cir. 1962); see also, Ballou v. General Electric Co., 393 F. 2d 398 (1st Cir. 1968). Although some courts have held that leave to amend may not be granted after dismissal without a motion for relief from the judgment of dismissal under F.R.C.P. Rules 59 or 60, see, e.g., Markert v. Swift & Co., supra, this consideration is not relevant here since a motion for relief from the judgment of dismissal was made concurrently with the motion to amend.

motion for reargument. The district court's decision to dismiss was explicitly based on plaintiffs' failure to make certain specific allegations which plaintiffs now wish to make. The policy of the Federal Rules against decisions on technical defects of pleadings as well as their policy in favor of liberal amendment call for granting plaintiffs' motion for leave to amend.

The district court also erred in denying plaintiffs' motion for leave to introduce additional evidence. Rule 59 of the Federal Rules of Civil Practice allows a court to re-open any issue, after judgment, and accept new evidence, if such a motion is made within 10 days after the entry of the judgment. Plaintiffs made their motion the day after judgment, so they satisfy the requirements of this rule. It is conceded that a motion for leave to re-open is directed to the judicial discretion of the court. Sanden v. Mayo Clinic, 495 F. 2d 221 (8th Cir. 1974). However, a court will be deemed to have abused that discretion where "there is a clear showing that there was no reasonable basis within the range of discretion for the action taken." DuPont v. U.S., 385 F. 2d 780, 783 (3rd Cir. 1967). Such was the case here.

A motion to introduce additional evidence must pass certain roadblocks before it can be granted. The movant must show diligence or justification for his failure to present the evidence earlier. Here, there is a clear and

valid justification. The additional evidence, although available before the disposition of the present motion for summary judgment, had not yet been obtained by plaintiffs when defendants first moved for summary judgment. The district court, based on the evidence before it at that time, ruled that "real and genuine issues of fact to be resolved at trial" had been raised. See Memorandum and Order, January 21, 1975 (I-72). When the defendants moved for leave to reargue the summary judgment motion, they introduced no new evidence to support their motion; and the then new decision in Capital Temporaries Inc. v. The Olsten Corp., supra, cited by defendants, announced no new principle of law. American Manufacturers Mutual Insurance Co. v. American Broadcast-Paramount Theatres, 446 F. 2d 1131 (2nd Cir., 1971) upon which Capital Temporaries was based, had previously announced the Second Circuit's coercion requirement for tying arrangement antitrust cases.

When faced with another motion for summary judgment which offered no new supporting proof or standard of law, plaintiffs were fully justified in relying on the district court's previous ruling. When the district court reversed itself, justice and equity demanded that the plaintiff be allowed to introduce further evidence. The situation is analogous to the one in Halper v. Browning, King & Co., 325 F. 2d 644 (D.C. Cir. 1963). That case involved a suit to coll[illegible]t commi[illegible]ions on sales. A pre-trial order had put

the burden on the defendant concerning the issue of the amount of losses. Relying on this ruling, plaintiff rested without proving the amount of losses. The trial court granted summary judgment to the defendant at the close of the case and ruled that the burden to prove amount of losses had been on the plaintiff. The Court of Appeals, in a <u>per curiam</u> opinion, held that since the case had proceeded under a misapprehension, the judgment should be opened and additional evidence allowed.

Similarly, here, where there was a misapprehension concerning whether the coercion requirement had been satisfied, due to the reversal by the Court of its own prior ruling, the plaintiffs should have been allowed to present their additional evidence.

The plaintiffs' evidence satisfied the other requirements for introduction of additional material. Such evidence must be new, not cumulative, <u>Ryan v. United States Lines Co.</u>, 303 F. 2d 430 (2nd Cir. 1962), and likely to produce a different result. <u>Kirby v. U.S.</u>, 297 F. 2d 466 (5th Cir. 1961).

The additional affidavits and a transcription of the sales presentation of Sheldon Lieberman, a leading salesman for the Compact defendants, offered by plaintiffs meet this standard. (Motion, Transcript of 1970 tape recording, I-84) The further affidavit of plaintiff Cheryl Perry Hill, sworn to March 12, 1975 (HILL Aff'd. ¶4, I-84) states in part that

"[b]y making it impossible for me to obtain FBP separately, the Compact company really coerced me into buying the Compact vacuum cleaner, which I did not need or want." "If FBP had not been included as part of the sale, I would not have bought the Compact vacuum cleaner. If I could have bought FBP separately, I would have bought it and would not have bought the vacuum cleaner." (*Id*. ¶5, I-84)

The affidavit of plaintiff Lurline Rutherford sworn to March 19, 1975 (RUTHERFORD Aff'd., I-84) shows that Family Buying Power was instrumental in her decision to purchase the Compact vacuum cleaner:

> 5. When I bought the Compact, there were no rugs in my apartment and I did not need a vacuum cleaner. I was not shopping for or interested in buying a vacuum cleaner. I have never used the Compact since the day I bought it and it is still in the box at home. If the buying service had not been included as part of the sale, I would not have bought the Compact vacuum cleaner. Therefore, I believe that Family Buying Power was used to coerce me and my husband into buying the Compact vacuum cleaner, which we did not need or want. (I-84)

The Lieberman transcript, authenticated by the March 13, 1975 affidavit of Isabel Little, vividly shows coercion by the Compact salesman. (Transcript, I-84) Family Buying Power, he says, is not for sale separately. It can only be obtained as a component of a larger package, which includes the vacuum cleaner. "This club, or this wholesale business that we are giving is not for sale in the New York area."

P. 10 (emphasis added). LIEBERMAN: . . . "In order to get him a discount he has to be a member. In order to become a member . . . he has to get this. LITTLE: The vacuum. LIEBERMAN: The vacuum!" P. 11. "The only way we can do it is if the people take our product, which is the Compact cleaning machine." P. 10 (emphasis added). "In New York, we're doing things a little differently and we feel that one helps with the other." P. 17. Family Buying Power membership is represented as unique. "Now this is very unique." P. 4. "This is something unique." P. 5. The membership is represented as costing $360.00 when sold separately in other parts of the country. Pp. 17, 18, 35, 55. The salesman claims that FBP members are saving $300 to $500 per year. Pp. 46, 58. The amounts which can be saved are stated to be at least equal to the monthly payments on the vacuum, p. 37, although some people even make a "profit," P. 12. "In the long run, the money you pay on this machine you get back." P. 46. The concern of the salesman is primarily on selling FBP: the Compact vacuum cleaner is hardly mentioned until one-third of the way through the sales pitch. As Lieberman concedes, "The price [$399.95] sometimes can shock a person until a person actually sees everything that it has. But when they hear about the wholesale service, that makes the prices very easy to take." P. 45 (emphasis added). That is precisely why the tie to Family Buying Power was used by defendants, and its coercive

impact on sales in the tied-product market is precisely the evil to which the Supreme Court tie-in cases have been addressed. (I-84)

As the Supreme Court said in Foman, supra at 181:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities . . ."

Thus, all of the additional evidence plaintiffs wished to offer, like their requested amendments to the pleadings, were directed at meeting the requirement of specific individual proof of coercion, on which Judge Bruchhausen had relied in dismissing the complaint. There was no reason that the motion should not have been granted.

CONCLUSION

For all of the foregoing reasons, the orders of Judge Bruchhausen dated March 5, 1975 and April 11, 1975, granting the defendants' motions for summary judgment and denying plaintiffs' motion for leave to amend their complaint and statement pursuant to Local Rule 9(g), should be reversed in all respects.

Respectfully submitted,

Dated: July 25, 1975
Brooklyn, New York

Janet Benshoof

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Of Counsel:

JANET BENSHOOF
DOUGLAS V. ACKERMAN

JAMES WHITLOW, Law Intern

INDEX ON APPEAL

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

JANET BENSHOOF, being duly sworn, deposes and says:

1. That she is not a party of the action, is over 18 years of age and works at 152 Court Street, Brooklyn, New York.

2. That on the 24th day of July, 1975, she served the within Appellants' Brief upon the following attorneys for Defendants herein at the following addresses:

NORMAN S. LANGER, ESQ.
Attorney for Compact Defendants
26 Court Street
Brooklyn, New York 11242

BARRY FREDERICKS, ESQ.
Attorney for Defendant A-T-O, INC.
Harris Fredericks & Korobkin, Esqs.
1271 Avenue of the Americas
New York, New York 10020

BARTON BLUMBERG, ESQ.
Attorney for Family Buying Power Defendants
DiFalco, Field & O'Rourke, Esqs.
605 Third Avenue
New York, New York 10016

the above-stated addresses being the addresses designated by said attorneys for that purpose, by depositing true copies of same enclosed in post-paid properly addressed wrappers, in an official depository under the exclusive

care and custody of the United States Postal Service within the State of New York

Janet Benshoof
JANET BENSHOOF

Sworn to before me this
24th day of July, 1975

Douglas V. Ackerman
NOTARY PUBLIC

DOUGLAS V. ACKERMAN
Notary Public, State of New York
No. 31-4513284
Qualified in New York County
Commission Expires March 30, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

FORTNER ENTERPRISES, INC., Plaintiff	)	
v.	)	Civil Action No. 4392-G
UNITED STATES STEEL CORPORATION and U. S. STEEL HOMES CREDIT CORPORATION, Defendants	)	

J U D G M E N T

This Court interpreting the actions of the Sixth Circuit Court of Appeals as having by its Opinion appearing at 452 F. 2d 1095 (1971) and by its Judgment issued as Mandate on June 28, 1972, to have set aside only that portion of this Court's Judgment previously entered on November 23, 1970 (bearing interest from September 18, 1970) concerning certain liability issues but leaving intact that portion of said Judgment establishing the amount of plaintiff's damages trebled, attorneys' fees through the 1970 trial, and costs and said Opinion and Mandate of the Sixth Circuit Court of Appeals having thereby limited retrial to certain liability issues and thus prohibited plaintiff from re-trying its damage issues and thereby having liquidated plaintiff's damages, the Court finds that interest should apply to said treble damage award, attorneys' fees and costs from September 18, 1970, and

The parties hereto having agreed that this Court should act as Finder of Fact and having waived a jury trial on those liability issues to be re-tried and this Court having entered

its Findings of Fact and Conclusions of Law on August 13, 1974, finding in plaintiff's favor on said issues of liability, and having further found that plaintiff is entitled to an additional award of attorneys' fees for work done since the June, 1970 trial of this action, it being believed by us that the subsequent appeals would have occurred regardless of whether this Court gave plaintiff a directed verdict in 1970, or whether a jury had found for plaintiff on liability in 1970, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the Judgment entered on November 23, 1970, in favor of Plaintiff, Fortner Enterprises, Inc., against the Defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, jointly and severally, for trebeled damages, attorneys' fees and costs in the sum of $427,016.75, with interest thereon at the rate of 6% per annum from September 18, 1970, until paid, is in full force and effect.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff, Fortner Enterprises, Inc., have Judgment against the Defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, jointly and severally, for supplemental attorneys' fees since the June, 1970 trial in the amount of $32,500.00 with interest thereon at the rate of 6% per annum from date of entry hereof.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff, Fortner Enterprises, Inc., have Judgment against the Defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, jointly and severally, for its assessable costs incurred since November 23, 1970 of $2,330.71, with interest thereon at the rate of 6% per annum from date of entry of this Judgment.

This is a final Judgment, there being no just cause for delay.

September 19, 1974

James F. Gordon

JAMES F. GORDON
United States District Judge

Copies to:

Mr. Kenneth L. Anderson

Mr. A. Scott Hamilton, Jr.

Mr. Albert F. Reutlinger

ENTERED
SEP 20 1974

Fortner
2-15-74

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 4392

FORTNER ENTERPRISES, INC., PLAINTIFF

v. FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES STEEL CORPORATION and
UNITED STATES STEEL HOMES CREDIT CORPORATION DEFENDANTS

BACKGROUND OF THIS LITIGATION

This action was originally filed in 1962 and has had a long history in this and the Appellate Courts since then. Plaintiff, Fortner Enterprises, Inc., is claiming violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2. In 1966 this Court sustained the Motions of defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation [hereinafter called Credit Corporation] dismissing plaintiff's Complaint as amended [293 F. Supp. 762]. The Sixth Circuit Court of Appeals affirmed without Opinion.

The Supreme Court reversed and remanded the action to this Court with directions for the case to proceed to trial. Fortner Enterprises v. United States Steel Corporation, 394 U.S. 495 [1969]. The Supreme Court's comprehensive Opinion set forth the guidelines for this Court to follow in trying this case before a jury.

During the month of June, 1970, this case was tried before a jury. At the close of all the evidence both plaintiff and de-

fendants moved for directed verdicts on liability. After considering the evidence presented in light of the Supreme Court's Opinion, this Court felt that the undisputed facts established all of the elements of an illegal tie-in agreement which constituted a per se violation of Section 1 of the Sherman Act by both defendants and, therefore, directed a verdict for plaintiffs as to liability. The questions of causation [fact of damage] and amount of damages were submitted to the jury which found for plaintiff and awarded a verdict of $93,200.00. That sum was duly trebled in accordance with the antitrust laws and attorneys' fees and costs were awarded.

Defendants filed Motions for Judgment N.O.V. and New Trial which were overruled. Defendants then appealed to the Sixth Circuit which reversed in part only at 452 F. 2d 1095. The Sixth Circuit found that the facts were undisputed as to two of the three elements of an illegal tie-in agreement, namely, that a tie-in did exist and that a not insubstantial amount of interstate commerce in the tied product was affected, but found that there were varying inferences which a jury might draw from the evidence concerning the third element, sufficient economic power over the tying product. It appeared clear from the Sixth Circuit Opinion to this Court and counsel for all parties that only limited issues of liability were to be retried, with plaintiff to keep its damage Judgment if liability is decided in its favor.

Retrial of the liability issues was scheduled before a jury on November 12, 1973. On that date prior to the commencement

of trial plaintiff offered to waive jury trial if defendants agreed and to allow this Court to decide the issues as fact finder based on the record from the 1970 trial plus any additional evidence to be offered by either side. Defendants agreed.

Plaintiff's purpose in waiving a jury was to avoid fragmentation of the evidence, to eliminate any potential problems with instructions and to hopefully finally dispose of this protracted litigation without another time consuming and expensive trial.

This Court commends counsel for all parties for this procedure which should finally put this case to rest.

Supplemental evidence was offered by plaintiff on November 16, 1973 and by defendants on November 20, 1973.

After having again reviewed the evidence introduced at the 1970 trial and having heard and reviewed the supplemental evidence, this Court as finder of fact has concluded that defendants did have sufficient economic power over the tying product, loans under certain terms and condition, and that the defendant, Credit Corporation, did have a competitive advantage in the credit market to enable it to impose the tie-in agreement on plaintiff and that the defendants were, therefore, in violation of the Sherman Act. My detailed findings of fact and conclusions of law follow.

FINDINGS OF FACT

1. When this case was appealed to the Sixth Circuit Court of Appeals following the June, 1970 trial, a three volume Joint Appendix was printed and filed withthe Sixth Circuit. Most of the

evidence relied upon by the parties is contained in those three volumes. Any evidence or other material relied upon in these Findings which appears in the three volume Joint Appendix will simply be referred to by page number in parenthesis. All pleadings, testimony or exhibits relied upon which do not appear in the three volume Joint Appendix will be otherwise appropriately identified.

2. Fortner Enterprises, Inc., laintiff herein, is a corporation organized under the laws of the Commonwealth of Kentucky with its principal place of business in Louisville, Jefferson County, Kentucky. Its principal stockholder is A. B. Fortner, Jr.

3. The defendant, United States Steel Corporation, is generally known to be the largest manufacturer of steel in the United States and is one of our Nation's largest corporations. For some time prior to 1959, one of United States Steel Corporation's Divisions has been known as the United States Steel Homes Division [hereinafter called Homes Division], which had as its function the manufacture and assembly of component parts which comprise various models of prefabricated house packages.

4. The defendant, U. S. Steel Homes Credit Corporation [hereinafter called Credit Corporation], is a separate corporate entity owned by United States Steel Corporation and is, therefore, a subsidiary of United States Steel Corporation. The Credit Corporation was established in 1954 [Certificate of Incorporation, PX 2-E].

5. The Homes Division of United States Steel made a presentation to the Finance Committee of United States Steel at its January 12, 1954 meeting [PX 1-M; 108], which recommended that a

financing corporation be established to provide construction money and to originate mortgages for resale to investors [1088,1089]. That exhibit indicates that the proposed finance corporation "...will not be used as a means to force sales to dealer-builders" [1090].

6. The United States Steel Corporation's Finance Committee Minutes [PX 1-W; 1095,1096], authorized and directed the Credit Corporation to establish a "special" financing program of land acquisition and development loans to dealers in order to enable the Homes Division"... to obtain a minimum distribution of 1800 units in 1959, and such additional distribution as may be feasible ...". Those loans were to be "...without conformity with conventional or conservative patterns but within the bounds of prudent business judgment;" provided that the Homes Division underwrite and guarantee losses to a defined extent. Subsequent Finance Committee Minutes indicate that the program was authorized to assist in increasing sales of the Homes Division for 1960 and 1961 [1098].

7. The Court thus finds that there was a change in policy established by the defendants which resulted in Credit Corporation's loans being used as a "tool" to aid the Homes Division in making sales of prefabricated house packages.

8. The Homes Division's factory and principal office in 1960 was located in Southern Indiana just across the Ohio River from the Louisville, Jefferson County, Kentucky area. The Homes Division at that time desired to expand its sales of prefabricated house

packages in the Louisville, Jefferson County, Kentucky, area. At that time, Mr. A. B. Fortner, Jr., and another gentleman owned a corporation known as Iroquois Developers which owned a subdivision in Jefferson County, Kentucky. A portion of that subdivision had already been developed and the lots had been sold to builders who had built houses upon them. The remaining portion of that subdivision had been partially developed by the construction of streets and installation of necessary utilities and the remainder of the subdivision, while platted, was still undeveloped [PX 42 and 43; 1226-1228].

9. One of Mr. Fortner's salesmen learned of the special financing program of the Credit Corporation and advised the Homes Division personnel of Mr. Fortner's interest in the subdivision in Jefferson County, Kentucky. As a result, Mr. Fortner was contacted by Homes Division representatives and negotiations were commenced designed to interest Mr. Fortner in building prefabricated house packages in the subdivision [211,212]. At that time Mr. Fortner was advised of the Credit Corporation's special financing program which could provide loans for land acquisition and development as well as the purchase and building of the houses themselves [212].

10. Credit Corporation representatives then became involved in the negotiations which resulted in their offering Mr. Fortner 100% land acquisition and development loans plus all of the money which would be required to purchase the prefabricated house packages and build them [214,215]. The negotiations at that point had been premised upon Mr. Fortner buying out the

interest of his co-stockholder in Iroquois Developers. However, in Mid-1960, Mr. Fortner's co-stockholder, a Mr. Robards, indicated that he would not consent to be bought out and that he desired to attempt to undertake the development and buy out Mr. Fortner's interest. Mr. Fortner agreed to this and Mr. Robards then commenced negotiations with the Credit Corporation but could not make an arrangement with them. Mr. Robards then agreed to sell his interest to Mr. Fortner in Iroquois Developers and the negotiations between Mr. Fortner and the Credit Corporation were reactivated [PX 43; 1227,1228].

11. The Credit Corporation then reaffirmed its offer of 100% land acquisition and development loans plus all of the money Mr. Fortner would require to purchase the prefabricated house packages and build the houses. This offer was conditioned upon an agreement that there would have to be erected on each lot in the subdivision a prefabricated house package manufactured by the defendant, United States Steel Corporation [220,221].

12. A. B. Fortner, Jr., had for quite a number of years prior to 1959 owned a real estate brokerage company in Louisville, Kentucky, known as Zetwoch-Fortner Corporation which had sold thousands of residential properties in the Louisville and Jefferson County, Kentucky area [206]. Mr. Fortner, through other companies, had been involved in real estate development and had also been involved in the construction of some residential dwellings. As a result, Mr. Fortner was personally familiar with the type of land acquisition and development loans available in the Louisville and

Jefferson County area, and to his knowledge, particularly, 100% land acquisition and development loans were not available from any conventional lending source of any type or any source known to Mr. Fortner in 1959 or 1960 [221].

13. The type of loan offered Mr. Fortner by the Credit Corporation was highly attractive and unique to Mr. Fortner since to his knowledge no such loans were available from other sources and for that reason he was willing to accept at that time the requirement that he erect upon each lot in the subdivision a prefabricated house package manufactured by the Homes Division of United States Steel Corporation.

14. Mr. Fortner, prior to and during 1960, owned all but a few shares of a corporation known as the Gold Rose Gift Shop. This corporation was dormant and had a $16,000.00 deficit, and it was agreed that its name would be changed to Fortner Enterprises, Inc., and that said corporation would purchase the subdivision in question from Iroquois Developers. Mr. Fortner was not required to personally endorse or guarantee the loans to be made by Credit Corporation to Fortner Enterprises, Inc.

15. As a result of the above described negotiations, in October, 1960, notes, a mortgage and a loan agreement were executed by Fortner Enterprises in favor of the Credit Corporation [44-74]. The notes bore an interest rate of 6% and a fee or discount of 1/2 of 1%. The loan agreement specifically contained the requirement that Fortner Enterprises, Inc., purchase and erect on each lot in the subdivision a prefabricated house package manufactured by

the Homes Division of United States Steel Corporation. The contractual obligations represented by the notes, mortgage and loan agreement were between Fortner Enterprises, Inc., and the Credit Corporation. The United States Steel Corporation was not a party to that agreement. However, that agreement did specifically contain the tie-in requirement of the purchase and erection of the prefabricated house packages of the Homes Division of the United States Steel Corporation.

16. Since it is undisputed that the tie-in provision was in the loan agreement and since the defendants have offered no additional evidence raising any question as to the existence of the tie-in provision, in accordance with the last Opinion of the Sixth Circuit in this case, this Court finds as a matter of law that the tie-in agreement complained of by plaintiff did exist.

17. Following the execution of the notes, mortgages and loan agreement, Fortner Enterprises ordered and erected certain model homes, had a grand opening and commenced the sale of houses from the models [222-224]. Sales initially were quite good and Fortner Enterprises began building the houses sold in the first few months following the grand opening [231]. During the Summer of 1961, as Fortner Enterprises began building the homes which had been sold, an additional 32 lots became available in the subdivision which had been sold to a contractor who had become the General Superintendent for construction in the project in question. The Credit Corporation agreed to make another 100% land acquisition

and development loan to add these 32 lots to the project with the loan also to meet all requirements for the purchase of the prefabricated house packages and building of the houses and this transaction was concluded in August, 1961 by the signing of a note, mortgage and loan agreement. That loan agreement also contained the tie-in provision referred to above [254-255].

18. During the June, 1970 trial of this action, plaintiff introduced substantial evidence which plaintiff claimed established that it had encountered certain problems with the Homes Division prefabricated house packages, including shortages of components upon delivery and defects in design and manufacture. Plaintiff claimed that as a result of these problems, its subdivision developed a bad reputation and lack of consumer acceptance which resulted in plaintiff's inability to sell additional houses. This evidence was introduced primarily to establish the fact of damage to the plaintiff which was resolved by the jury in the 1970 trial in favor of the plaintiff. This evidence is alluded to in these Findings only as background for the events which occurred after plaintiff began complaining to the Homes Division about shortages and defects in design and manufacture of component parts.

19. Mr. Fortner testified that in the latter part of 1961 he contacted Mr. Richard Dyas, Vice President of the Credit Corporation, and advised him of the unsatisfactory character of the prefabricated house packages of the Homes Division and his company's inability to sell them and requested that Fortner Enterprises, Inc., be relieved of the tie-in provisions of the loan agreement in order

that it might build another prefabricated house package or a conventional home. Mr. Dyas refused this request [256, 257].

Fortner Enterprises, Inc., continued to attempt to sell the Homes Division's prefabricated houses and continued to complain of the quality of those houses until June 5, 1962 when a meeting took place at the offices of counsel for the plaintiff which was attended by Mr. A. B. Fortner, Mr. Herman Miles and others representing the plaintiff and by Mr. Black and others representing the Homes Division of United States Steel Corporation and by Mr. Dyas and Mr. Rollings of the Credit Corporation. The Court finds that the witnesses for all parties agree that plaintiff's complaints concerning the prefabricated house packages were expressed at that meeting and that plaintiff sought to be relieved of the tie-in appearing in the loan agreements in order that plaintiff might build another type of prefabricated house or a conventional house in its subdivision thereby making it possible to pay off its debt to the Credit Corporation. This request was refused by Mr. Dyas of the Credit Corporation [261-263].

20. The Court finds that Fortner Enterprises' account with the Credit Corporation was current as of the June 5, 1962 meeting [PX 242; 1300,1301], but that immediately following the June 1962 meeting the Credit Corporation began the preliminary steps [illegible] to foreclose upon the plaintiff's subdivision under the mortgage given as a part of the package [PX 126 and 127; 1247-1250; PX 132, 1258-1263]. As a result the Credit Corporation wrote the plaintiff

liability issues to be re-tried and this Court having entered

on July 12, 1962 demanding payment of all outstanding obligations [PX 3; 75].

21. Shortly after the July 12, 1962 letter on July 19, 1962, this antitrust action was filed by plaintiff against both defendants [38-76].

22. The second required element of an illegal tie-in agreement violative of the Sherman Act is that a not insubstantial amount of interstate commerce in the tied product be restrained. Plaintiff's evidence established that under the two loan agreements entered into with the Credit Corporation plaintiff was required to purchase 210 prefabricated house packages. The least expensive house package which plaintiff was purchasing cost plaintiff approximately $3,150.00 [637]. This amounts to a total of $689,850.00 worth of house packages which plaintiff was obligated to purchase under the terms of the loan agreement and under the requirements of the tie-in contained therein. In addition, the undisputed evidence from the defendant's own records established that with insignificant exceptions, all loans made by the Credit Corporation contained the tie-in agreement [742-744] resulting in millions of dollars of sales of house packages by the Homes Division in 1960, 1961 and 1962 [1199]. Thus, the undisputed evidence established that substantial amounts of interstate commerce in the tied product, the prefabricated house packages, were restrained by the tie-in agreement, or agreements, complained of whether plaintiff's own purchases or commitments to purchase are viewed by themselves or whether they are viewed as a part of the larger volume of sales connected with Credit

Corporation's entire lending program. Since no new evidence was introduced by defendants concerning this element of the case, in accordance with the Supreme Court's Opinion in this action and the last Opinion of the Sixth Circuit in this action, this Court finds as a matter of law that plaintiff has met its burden concerning this element and that as a matter of law a not insubstantial amount of interstate commerce in the tied product was restrained.

23. The third required element for the establishment of an illegal tie-in agreement violative of the Sherman Act involves the Credit Corporation's economic power over the tying product, in this case, loans under certain terms and conditions to appreciably restrain trade in the tied product. As previously indicated, this Court finds that the Credit Corporation did have sufficient economic power over the tying product or element and the evidence which leads the Court to this conclusion is set forth in the following series of Findings.

24. William H. Lang was President of the defendant, Credit Corporation, during all times pertinent to this litigation [895]. Portions of Mr. Lang's deposition were read into evidence by plaintiff. Mr. Lang testified that when a dealer, such as Fortner Enterprises, was not able to finance through local or normal channels, the Homes Division of the defendant, United States Steel Corporation, would call in the Credit Corporation to meet the dealers' financing problems [896]. Mr. Lang went on to testify that the Credit Corporation consistently aided the Homes Division sales program through aid given to dealers [897], and he went on to

testify that the Credit Corporation had made loans at the insistence of the Homes Divison when the Credit Corporation did not consider the loans to be a good financial risk when regular banking and financial principles were applied [897,898]. Mr. Lang at the trial of this action itself testified that at the direction of defendant, United States Steel Corporation, the Credit Corporation instituted in 1958 its special financing program concerning land acquisition and development to help the Homes Division increase its sales of house packages, that the loans made at the request of the Homes Division under the special financing program were to be guaranteed by the Homes Division including specifically the Fortner Enterprise's loans [972-975]. Plaintiff's Exhibit 237 [1258], is the Underwriting Agreement in which the Homes Division guaranteed the land acquisition and development portions of the Fortner loans as well as loans made to a number of other dealers under the special financing program. This Court thus finds that the defendants' own witness has testified that the loans made under the Credit Corporation's special financing program were a special type of loan not available from normal or conventional sources.

25. The Underwriting Agreement [Plaintiff's Exhibit 237, 1268], lists forty-three [43] separate loans which were classified as the high risk type loans for which the Credit Corporation wanted to be protected by the Homes Division [981]. These were all land acquisition and development loans [980].

26. Turning specifically to the loans made to Fortner

During the month of June, 1970, this case was tried before ... At the close of all the evidence both plaintiff and de-

Enterprises, Inc., for land acquisition and development, the evidence was undisputed that those loans made by Credit Corporation to Fortner Enterprises, Inc., amounted to 100% of Fortner Enterprises' cost to acquire the land in question and to develop it, including the installation of streets and all utilities to the point that the lots were ready to have houses built on them. This was the portion of the loan which the defendant, United States Steel Corporation, guaranteed to the Credit Corporation. The evidence also established that the construction portion of the loans from Credit Corporation to Fortner Enterprises amounted to all of the funds which Fortner Enterprises required under normal circumstances to build houses on the lots. The construction loan, of course, did not cover costs incurred by Fortner Enterprises at the closing of a sale to a purchaser, nor did they include Fortner Enterprises' profit.

27. The Court finds from Mr. Fortner's testimony that 100% land acquisition and development loans were quite unique to Mr. Fortner as President of the plaintiff corporation. Mr. Fortner had been associated with the real estate business in many capacities for quite a number of years before the transactions in question. He had been involved himself in the development of subdivisions and in obtaining financing for such development, as well as in assisting in obtaining financing for customers or clients. Mr. Fortner was familiar with the types of land acquisition and development loans available in the Louisville area and he has testified that no such loans, to his knowledge, were available from

any other source, particularly when the other significant terms of the loans were considered. Those terms were 6% interest plus 1/2 of 1% discount fee, along with no requirement of a personal guarantee by himself as President of the corporation or by any other officer of the corporation.

28. Mr. Fortner's testimony and other substantial evidence and testimony whichwere not contradicted by defendants have convinced this Court that the lc ns in question were unique. This Court has taken judicial notice that Federal statutes or regulations prohibit Federally insured banks and savings and loan associations from making 100% land acquisition and development loans. Mr. Edwin Horn, President of Louisville Mortgage Service Company, testified in this action. Louisville Mortgage Service Company at the time in question and for many years prior thereto has been in the business in Louisville, Kentucky, of making loans for commercial investors, including commercial banks and insurance companies. None of Mr. Horn's customers were making 100% land acquisition and development loans on the terms given to Fortner Enterprises or any terms during this period of time and such loans to Mr. Horn's knowledge were not available in this area during that time.

29. Mr. Charles Henne of Prudential Life Insurance Company testified that as a matter of policy Prudential Life Insurance Company was not making any land and acquisition development loans during the period of time in question, much less 100% land acquisition and development loans.

30. Mr. Paul F. Semonin is one of the best known realtors and real estate developers in the Louisville and Jefferson County area. Mr. Semonin has been associated with the real estate business in this area for about 35 years [868]. During the period 1969 through 1961, Mr. Semonin was familiar with the type of financing available to developers and builders and his testimony was that there were not any 100% land acquisition and development loans available from normal or conventional sources during that period of time [868-869].

31. Plaintiff, as a part of its supplemental evidence presented on November 16, 1973, called Mr. Ralph Logan, President of Southern Savings & Loan Association, a Louisville, Kentucky state chartered savings and loan [November, 1973, Transcript, p. 139]. Southern Savings & Loan did not make any land acquisition and development loans during the pertinent period of 1959-1961 [p. 142]. The largest loan which Southern Savings has ever made has been somewhere between Two Hundred and Two Hundred and Fifty Thousand Dollars [p. 143]. Mr. Logan testified that Southern Savings would not have made a land acquisition and development loan of the character which the Credit Corporation made to Fortner Enterprises whether or not Fortner Enterprises had a deficit at its beginning [pp. 143,144]. Mr. Logan, as President of Southern Savings during 1959 through 1961, kept abreast of market conditions in the Louisville area and the types of loans that were

available and he was unaware of any building and loan associations that would have made a 100% land acquisition loan during that period and he didn't know of any body making such loans during that period [p. 145]. In his opinion a 100% land acquisition and development loan is not a prudent loan due to the risk factor [p. 146].

32. Mr. Charles Will, President of Portland Federal Savings & Loan Association, was also called as a witness as a part of plaintiff's supplemental proof given in November, 1973 [p. 157]. Mr. Will testified that the Federal regulations applicable to Federally insured savings and loan associations in 1959 limited loans for land acquisition and development to 60% of the value of the raw land and 60% of the development cost [p. 158]. Mr. Will testified that his company could not under the regulations make a 100% land acquisition and development loan [p. 159], and even if they were not restricted by such regulations they would not make such a loan [p. 160]. Mr. Will pointed out that a 100% loan of that nature is not a conservative loan and amounts to the lender buying the property [p. 160]. Mr. Will, as President of Portland Federal, kept abreast of market conditions and the types of loans made during the 1959-1961 period and to his knowledge no normal or conventional lending source was making 100% land acquisition and development loans during that period [pp. 162, 163]. Portland Federal did begin making some land acquisition and development loans at the 60% level in 1961 or 1966 and it is significant to this Court that the interest rate was 6% and the terms of the loans were generally for two years along

with service fees which ranged up to 5% [pp. 160-162]. The Court thus finds that Portland Federal was able to obtain the same interest rate which the Credit Corporation obtained for a loan made for the same period of time, two years, as the Credit Corporation loan to the plaintiff and that Portland Federal was able to obtain a higher service fee for the loan even though the loan in relation to raw land value and development cost was 60% instead of the 100% loan which the Credit Corporation made. Clearly the land acquisition and development loan made by the Credit Corporation to Fortner Enterprises was more advantageous to Fortner Enterprises than the type of land acquisition and development loan which Portland Federal was making. Fortner Enterprises was able to obtain 40% more money at less cost than it theoretically could have obtained from Portland Federal.

33. The defendants called as their witness, Mr. Innes Dobbins, President of Liberty National Bank & Trust Company, as of the time of his testimony, in 1970 [415]. Dr. Dobbins testified as to the study made under his supervision of excess funds theoretically available for lending through banks, savings and loan associations and insurance companies in the Louisville area during the years 1959 through 1962, but there is no evidence in the record that such funds were available for 100% land acquisition and development loans under the terms given the plaintiff in this case. Mr. Dobbins also testified that it was his understanding that during the pertinent period of 1959 through 1961 Prudential Insurance Company and Louisville Mortgage Service Company were making 100% land and acquisition development loans

in this area [420,421]. However, the Court recognizes that Mr. Horn of Louisville Mortgage Service Company and Mr. Henne of Prudential Life Insurance Company have both testified that their companies were not making such loans during that period, as set forth previously in these Findings. Mr. Dobbins also testified as to a comparison between the rate of earnings of the Credit Corporation and two Louisville Savings Associations of which he had knowledge and found the Credit Corporation's earnings comparable to the Savings and Loan Associations. This Court does not find this comparison to be of great evidentiary significance since it merely indicates that the Credit Corporation was able to make a profit comparable to that of the two Savings and Loan Associations with which its profits were compared in spite of the high risk type loans made under the special financing program. Since the special financing program loans of the Credit Corporation were guaranteed or underwritten by United States Steel Corporation, the Credit Corporation would certainly not be expected to show a loss at least as a result of those loans since any such loss would have been covered by United States Steel Corporation. This comparison merely confirms that the Credit Corporation's interest rate and discount or service fee were comparable to those charged by Savings and Loan Associations.

34. Stanley Mack was called by the plaintiff as a witness at the trial of this action in 1970 [438]. At the time of that trial Mr. Mack was employed by the defendant, Credit Corporation. Prior to that time he had been employed by the Homes

Division of the defendant, United States Steel Corporation [439]. During the 1959 through 1961 period, Mr. Mack was the Manager of Sales Division and his job included sales training programs and seminars [439]. Mr. Mack identified Plaintiff's Exhibit 7 as a portion of the Homes Division's Sales Manual and it was duly offered into evidence [441]. Mr. Mack further identified the land acquisition and development portion of that Sales Manual as having been part of a refresher seminar given to the Homes Division personnel after consultation with the Credit Corporation [442-445]. Plaintiff's Exhibit 240 [1279], is a portion of the Sales Manual which is Plaintiff's Exhibit 7. Exhibit 240 was attached to Plaintiff's Exhibit 238 [1275], which is a letter from the head of the Homes Division, D. H. Boyd, to the Assistant General Solicitor of United States Steel Corporation dated August 1, 1962 and referring to this litigation. That letter states in part:

> "Beyong the 'regular'program of financing assistance offered to qualified builders and negotiated by the Credit Corporation there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter. In these cases our sales department, in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U.S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim

financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotiations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category." [1275, 1276].

It is clear from reading the Sales Manual of the Homes Division and the Credit Corporation's Minutes and other documents placed in evidence by plaintiff which were obtained from the defendants that the Credit Corporation's primary function was to make loans at whatever terms were required to obtain sales of prefabricated house packages for the Homes Division. In referring to land acquisition and development loans, the Sales Manual states:

> "When asked, 'What's your land development deal?', you can almost answer with the question, 'How high is up?'." [1287].

The Sales Manual concerning land acquisition and development loans goes on to point out that "...Most of the other major manufacturers make development loans in some form or another, but most of them charge a fee of 10% or more in addition to simple interest. We only charge a 1/2 point fee." [1291].

Finally, that Sales Manual sums up the way in which the

Credit Corporation was used as follows:

> "There have been a good number of special loans made in the past three years, each one a little different, but each one with some merit. Conversely, in some cases the Credit Corporation turned down what seemed to be a good real estate loan, but didn't look as though it would produce home shipments. I know of one case where there was a choice piece of ground, in an excellent location, supported by a strong market. The requested loan was to be guaranteed by a multi-million dollar corporation. From a pure real estate investment standpoint, it was excellent. However, we chose not to recommend the loan to the Credit Corporation because we couldn't see a full time qualified general manager or anyone in the organization with the ability or the time to merchandise our homes. In other words, I just didn't see how we would get very many houses shipped. Sure, the loan was secure, and the Credit Corporation would be paid back, but we wouldn't accomplish our only purpose in making the loan and that is shipping houses. That's why the Credit Corporation exists and that should be our first consideration before requesting financing assistance." [1296].

Concerning the <u>leverage</u> which the special financing program conferred to the Homes Division through the Credit Corporation, the Sales Manual states:

> "Does this approach sound a little rough on the dealer? I don't think so. Remember, he helped to determine a conservative one year program of development, in this case 40 lots. But the loan is paid back in only 22 lots. All your're asking him to do is produce in two years what he said could be done in less than one. Do you see the lever that this gives you? He is more likely to push hard to sell our houses when there is a penalty if he doesn't. People like to take the line of least resistance. Before this clause was put in, a program could be opened, and start slowly. It was easy to say, 'It's obviously the product, we'll go back to conventional or something else.' Now a program is opened,

sales start slowly and the thinking is, 'Let's bring in a new model,' or 'Let's improve on our advertising.' I think it gives us an excellent sales tool. It is not necessary for you to try to explain this to your dealer or prospect. It can be a matter of negotiation between the dealer and the Credit Corporation. I just wanted you to be aware of it." [1292].

35. Certain actions of the defendants confirm the application of the special financing program as described in the Sales Manual. In March, 1960, for example, while the negotiations were taking place which resulted in the October, 1960 agreements, the Credit Corporation was asking for assurances from the Homes Division that if Fortner Enterprises failed, the Homes Division would put the property in production or get another dealer to take over the project [PX C-21; 1134,1135; PX 55, 1232,1233].

Even earlier in January, 1960, a memorandum from Lang to Dyas [PX C-23, 1313] states:

> "With regard to (b) above, we should know, if possible, or at least have confidence that the dealer can make a satisfactory profit from the use of our product. With all of our money out front, he has very little incentive to finish off a project. If his profits are not adequate or are not comparable to his prior experience, then we probably do not have a good loan. In making this statement, it is not the financial risk aspects which are referred to, but rather the fact that the loan will not produce house sales. The worst thing that can happen - and perhaps we have it at Broyhill - is an unsuccessful development. This precludes, in most cases, any other house sales in that area, because the one we have there has been unsuccessful."

Thus, the Court finds that the Credit Corporation was not so much concerned with the risks involved in loans but whether they would help sell houses.

36. Plaintiff propounded to defendant, Credit Corporation, Requests for Admissions which were introduced in their entirety as Plaintiff's Exhibit 2. In response to Request for Admission 19, the Credit Corporation admitted "that the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial assistance f om the Credit Corporation for the years 1960, 1961 and 1962 are as follows: 1960, 68%; 1961, 70%; 1962, 75%."

The Credit Corporation in response to Request for Admissions 20, admitted that loan commitments for 1960 of the Credit Corporation totalled $22,625,805.00, for 1961 totalled $19,342,612.00 and for 1962 totalled $19,283,544.00.

The Credit Corporation in response to Request for Admissions 21, admitted that all loan commitments entered into in 1960, 1961 and 1962 contained the tie-in provision which is the subject matter of this suit, with relatively insignificant exceptions totalling $627,000.00 [742-744].

37. Land financing loans [land acquisition and development loans] outstanding at the end of 1960 amounted to $5,372,000.00 [1353], while house package sales of the Homes Division for that same year amounted to $6,747,353.00 [1199]. Land financing loans outstanding at the end of 1961 amounted to $5,918,000.00 [1353], while house package sales of the Homes Division were $5,051,992.00 for that same year [1199].

38. An analysis of the loans dated prior to the end of the calendar year 1961 listed in the attachment to the Underwriting Agreement in which the defendant, United States Steel Corporation, guaranteed certain identified land acquisition and development loans which qualified under the special financing program including those made to the plaintiff amounted to $7,738,000.00 [1273,1274], which figure was substantially in exces of the slightly over Five Million Dollars worth of house package sales made during the year 1961.

39. The evidence established that the Credit Corporation was funded by its parent corporation, United States Steel Corporation, partially by the purchase of stock, partially by loans from United States Steel to the Credit Corporation at an interest rate of one point above the applicable prime rate and partially through the Credit Corporation's borrowings from banks at the prime rate using the credit standing of United States Steel.

While United States Steel Corporation had elected to allow the Credit Corporation to obtain the bulk of the Credit Corporation's funds through borrowings from banks at the prime rate based on United State Steel's credit standing, the record also establishes that in July, 1961, United States Steel had agreed to purchase, upon request of the Credit Corporation, an additonal Nine Million Dollars' worth of stock and further had agreed to advance an additonal Twenty-nine Million Dollars which would have been subordinated to the bank loans [1101,1102].

40. The Credit Corporation's financial statements [1349-1355], indicate that it paid no dividends to United States Steel and that it had full use of its accumulated income.

41. The annual report of the defendant, United States Steel Corporation, for 1961 was introduced into evidence [1185]. This report also contained the figures for 1960. That report indicates that United States Steel Corporation had net income after taxes in 1960 of $304,200,000.00 and in 1961, of $190,200,000.00. It had cash and securities of $451,700,000.00 in 1960, and of $642,200,000.00 in 1961, and it had total assets, less current liabilities in excess of 3.8 Billion Dollars in 1960 and in excess of 4.3 Billion Dollars in 1961.

42. An analysis of the Credit Corporation's income statements for 1960 and 1961 [1355], indicates that the bulk of the Credit Corporation's expenses represent interest on loans payable. Obviously the United States Steel Corporation elected to use its credit standing with banks to allow the Credit Corporation to obtain the bulk of its capital from banks at the prime rate instead of United States Steel Corporation simply injecting the necessary capital into the Credit Corporation through the purchase of stock which would not have cost the Credit Corporation anything for its use in terms of paying interest therefor.

43. Plaintiff called as a witness at the 1970 trial Mr. Herman Miles. Mr. Miles and his company were the supervisors of the construction at the plaintiff's project in question. Mr. Miles had had experience in house building and was president of a local lumber company. Mr. Miles had had vast experience in computing the cost of building houses. Mr. Miles testified as to a comparison which he had made of the prefabricated house package of the Homes Division with the cost of materials and assembly of a conventional house comparable to the Homes Division house package and found that the United States Steel house

package was priced $455.00 more than the comparable components at the same point in a conventional home [637].

44. Plaintiff called as an expert witness Dr. John Masten on November 16, 1973 at the time plaintiff's supplemental evidence was presented. Reference to Dr. Masten's testimony in these Findings will, therefore, be to the Transcript of Evidence of the November, 1973 testimony.

Dr. John Masten has Bachelor and Master's Degrees from the University of Illinois and a Ph.D from the University of North Carolina. A rather extended summary of his background and qualifications and publications was filed without objection as Plaintiff's Exhibit 500.

Dr. Masten was a Professor at the University of Kentucky from 1948 to 1967. During the approximate five year period prior to his leaving the University of Kentucky in 1967, Dr. Masten had been the head of the Department of Economics and the Director of Graduate Study in Economics at the University of Kentucky (p.22). Dr. Masten left the University of Kentucky in 1967 to go to the University of Georgia where he teaches courses in Commercial Banking at the undergraduate level and courses in Money and Capital at the graduate level [p. 21].

During Dr. Masten's 19 years at the University of Kentucky the principal area of his teaching responsibility had been devoted to the financial or banking field and he had been active in and the Director of the program sponsored by the State Department of Banking, the University of Kentucky and the Kentucky Bankers Association which operated the annual program of the Kentucky School of Banking and he had continued to maintain that connection with the Kentucky School of

Banking since his tenure at the University of Georgia [pp. 22,23].

Dr. Masten, since he has been at the University of Georgia, has been the Program Director also of the Georgia Banking School. Both schools have a program that covers various areas of banking, including investments, management of bank funds, manpower utilization and most importantly, lending. In this connection, Dr. Masten constantly collects and reviews loan cases [pp. 23-26].

Dr. Masten has devoted a good deal of his time during the past 25 years to the collection of loan cases and study of them in Kentucky [p.26]. As a result of his work as an Economics and Banking Specialist at the University of Kentucky and his work in banking, and particularly the lending aspects of banking in conjunction with the Kentucky Bankers Association, Dr. Masten has a general knowledge of the principles that bank and non-bank lenders would follow in making land acquisition and development loans in Kentucky, including the Louisville and Jefferson County area for the period 1959, 1960 and 1961 [p. 30].

The Court finds that Dr. Masten was highly qualified to testify in the lending and economic areas involved in this litigation and Dr. Masten's qualifications were certainly not questioned by counsel for the defendants. Dr. Masten's particular background in Kentucky, including the period of time involved in this lawsuit, especially qualify him to testify about lending policies and practices in the Kentucky area.

Dr. Masten first pointed out that all loans are not the same and that there are risk differentials that make each loan almost separate

in its own characteristics [p. 27]. Assuming that all terms and conditions are the same, Dr. Masten pointed out that the larger the percentage of a land acquisition and development loan to cost of the land acquisition and development, the higher the risk of the loan becomes to the lender [p. 28].

He pointed out that a lender would want to be protected by some type of guarantee, whether it be in the context of the amount of the loan relative to the value of the property or a guarantee by some third party [p. 28]. In other words, normally a lender will lend a borrower money if the borrower could prove that he really doesn't need it [p. 28].

It was brought out that Dr. Masten, in preparing for testimony, had quite properly reviewed various key exhibits in this case including the Loan Agreement in question [Plaintiff's Exhibit 5], the Underwriting Agreement [Plaintiff's Exhibit ...], Financial Statement of the defendant, United States Steel Corporation covering 1960-1961 [Plaintiff's Exhibit 31], and the 1961 and 1962 Financial Statements of the Credit Corporation [attachments to Plaintiff's Exhibit 2].

In response to a hypothetical question which included the pertinent facts introduced into evidence in this litigation, ... the undisputed fact that the loans for land acquisition and development from the Credit Corporation to Fortner Enterprises represented 100% of the cost of land acquisition and development, and that as of the time of the first such loan, Fortner Enterprises had a deficit of approximately $16,000.00, and that

personal guarantees were required of any officer of Fortner Enterprises, Dr. Masten testified that a loan such as was made to Fortner Enterprises would not have been available from normal channels of credit. He pointed out that this was a very unique kind of loan and that it was not the kind of loan you would normally find in the housing credit market at that time [pp. 31,32].

Dr. Masten pointed out that this loan was unique in and of itself because it represented 100% of the cost of land acquisition and development particularly for the period of time in question. Such a loan is of such a high risk nature so that a prudent lender would have been unwilling to have made a loan involving 100% risk [p. 32].

Dr. Masten pointed out that the period of time in question, namely, 1959, 1960 and 1961, was a period of economic stability and not a period of inflation and that there was a definite risk inherent in a 100% loan under such conditions of economic and price stability [pp. 32,33]. He referred in support of his testimony that this was a period of economic stability to the wholesale price index.

One of the other unique characteristics of this loan as brought out by Dr. Masten was that the loan was guaranteed, not by an affiliate of the borrower but by an affiliate of the lender, namely: United States Steel Corporation [p. 33]. Dr. Masten went on to point out how highly unusual it is for a company connected with the lender to guarantee the loan to the lender. The normal situation

is for a company or person connected with or associated with the borrower to guarantee the loan to the lender [pp. 35,36].

Dr. Masten also pointed out that the tie-in provisions of the loan themselves made the loan unique and at the same time required the borrower to buy houses from the Homes Division as a condition of getting this unique type of loan [p. 33].

Dr. Masten pointed out that the rate of interest charged on these loans was 6% with a 1/2% fee. He pointed out that the prime rate at that time when all cost factors were considered would have run 5 to 5-1/2% and that the loan to Fortner Enterprises was above the prime rate but still low considering the risk involved in making the loan and that it would have been virtually impossible for Fortner Enterprises to have obtained a loan at that level of interest and fee from any other source [pp. 34,35].

Dr. Masten pointed out that which had been previously established in the record, which was, that banks generally were prohibited by law from making 100% land acquisition and development loans as well as Federally insured savings and loan associations and that other conventional lenders would not have made such loans at the time in question since they were not prudent loans due to the risk involved [p. 37].

It was Dr. Masten's Opinion that the Credit Corporation had economic power by granting terms to the borrower that were so distinctly unique that it was almost inconceivable that the funds could have been acquired from any other source [p. 38].

Dr. Masten pointed out that there are really segments of the credit market and it is not one over-all market. He pointed out that in his opinion 100% land acquisition and development loans of the nature and terms granted to the plaintiff were a segment of the credit market [p. 39], and that if you only have one lender making such loans within that segment of the market, then that lender has economic power within that segment [p. 39].

Finally, Dr. Masten testified that in his opinion, based on his analysis of the situation, including the nature of the loans made by the Credit Corporation and the Credit Corporation's relationship with United States Steel Corporation that the Credit Corporation had definite leverage in the segment of the credit market related to land acquisition and development loans as a lender because of the uniqueness of the terms of the loans made and that this leverage was exercised [pp. 47, 48].

45. Defendants called an expert witness, Mr. Karl Gustav Pearson, who was a Professor of Business Administration at the University of Michigan with a Bachelor of Arts degree,and he also was an Attorney [906]. Mr. Pearson had concentrated his work in the general real estate field but the record does not show that he had concentrated in financing or land acquisition and development loans.

Mr. Pearson expressed an opinion that 100% land acquisition and development loans were available in the Louisville area in 1959, 1960 and 1961 [912]. This opinion was based on a survey which Mr. Pearson allegedly made in Louisville in 1970 within six months

prior to the June, 1970 trial. Mr. Pearson did not identify the persons or organizations which he surveyed in Louisville. Mr. Pearson believed that 100% land acquisition and development loans were available from savings and loan associations, real estate syndicates, joint ventures, suppliers of materials that went into construction, sub-contractors and individuals.

The Court finds that Mr. Pearson's testimony is against the great weight of the evidence introduced at the trial of this action and that it was without sufficient foundation to be given substantial weight by this Court.

~~Defendants listed as potential witnesses at the trial scheduled for November, 1973, two additional expert witnesses, Professor Thomas Gies and Professor Randolph McGhee, and counsel for defendants requested and received leave of Court to allow Professor McGhee to sit with counsel for defendants and consult with them during the testimony of the plaintiff's expert, Dr. John Masten, given on November 12, 1973. However, neither of those experts was called by counsel for defendants as a witness as a part of defendants' supplemental evidence in November, 1973. The Court feels that a reasonable inference to be drawn from the defendants' failure to call their experts is that those experts would not have substantially contradicted or disagreed with the testimony of the plaintiff's expert, Dr. John Masten.~~ Deleted 9-9-74

46. The Court has reviewed the cross-examination of Dr. Masten by counsel for defendants. ~~As indicated above, counsel for defendants did not question the expertise of Dr. Masten.~~ The Court does not find that the cross-examination of Dr. Masten concerning

the substance of his testimony materially altered or weakened that testimony as has been outlined in the previous Finding. Actually, on cross-examination, Dr. Masten really put this economic power aspect of this case in context when he pointed out at page 130 of the transcript that a 70% borrower has 30% of his own equity involved and has much more freedom in terms of his choice of lender. Such a borrower does not have to enter into any kind of an agreement which ties him to a certain product.

CONCLUSIONS OF LAW

1. The basic principles on which this case must be decided are set forth in the Supreme Court's Opinion in this case in Fortner Enterprises v. United States Steel Corporation, 394 U.S. 495 and United States Steel Corporation v. Fortner Enterprises, Inc., 452 F. 2d 1095 (6th Cir., 1971). The Sixth Circuit held that there were questions of fact to be decided concerning the so-called "economic power" aspects of the liability issues of this case. We are guided in particular by footnote 4 appearing at the end of the Sixth Circuit's Decision. The Sixth Circuit points out that if no additional evidence is introduced then there was a tie-in and a not insubstantial amount of interstate commerce in the tied product was affected. No additional evidence has been introduced as to these points and the Court thus finds as a matter of law that there was a tie-in and that the requirements as to the amount of commerce in the tied product have been met.

The Sixth Circuit established as a broad guide for the finder of fact on the economic power issue "...whether the Credit Corporation .... had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product ....'". The issue was defined elsewhere in the Sixth Circuit's Opinion as being whether the Credit Corporation possessed leverage in the credit market sufficient to induce buyers in the market for prefabricated houses to accept a less competitive product. This leverage did not have to constitute monopoly power or market dominance.

The Sixth Circuit makes it clear that this Court as finder of fact must evaluate all of the evidence and reasonable inferences to be drawn therefrom in determining the economic power question.

2. This Court concludes under the guidelines established by the Supreme Court and the Sixth Circuit for this case that the Credit Corporation did have sufficient economic power or leverage to induce buyers, including Fortner Enterprises, to enter into the tie-in arrangement which required them to buy prefabricated house packages from the United States Steel Corporation. This Court finds that the purpose of the special financing program concerning land acquisition and development loans of the Credit Corporation was to be a "tool" to obtain sales of house packages. When United States Steel Corporation established the Credit Corporation it could have used some of its available cash to completely capitalize the Credit Corporation which would have placed the Credit Corporation's cost of money at a non-existent or very low

level. Instead of electing this course of action, the United States Steel Corporation purchased a certain amount of stock in the Credit Corporation and allowed the Credit Corporation to use United States Steel's credit standing to borrow money from banks at the prine rate. The special loan program was instituted by the Credit Corporation at the authorization of the Finance Committee of United States Steel Corporation to enable the Homes Division of United States Steel Corporation to sell prefabricated houses. The loans to be made under that program were loans for land acquisition and development to borrowers who could not obtain such funds from conventional sources and these loans were guaranteed by United States Steel Corporation. Since the primary purpose and objective of the Credit Corporation was to assist the Homes Division in making house package sales, the Credit Corporation clearly was not expected to maximize profits and as a matter of fact from its own financial records clearly elected to charge interest rates and fees commensurate with much lower risk loans than the Credit Corporation itself was making.

3. The Court finds that the Credit Corporation did have leverage in the credit market, or a segment thereof. The evidence established in this case that the land acquisition and development loans made by the Credit Corporation to the plaintiff with the tie-in involved were loans amounting to 100% of the cost of acquisition of land and development of the land at an interest rate of 6% with one-half of 1% fee for a two year term. The interest rate, fee and period of the loan were comparable to loans made by conventional

lending institutions for land acquisition and development but no other conventional lending institution during the period of time in question was making 100% land acquisition and development loans while the Credit Corporation was. Many organizations, such as Federally insured banks and savings and loan associations, were prohibited by law or regulation from making such high percentage of loan to value loans. The other conventional lenders in the market at the time were not making such high percentage of loan to value loans because of the great risk involved. When the Credit Corporation elected to make such loans it set itself apart from other conventional lenders because it was in effect willing to take higher risks because it had a purpose or motive which other conventional lenders did not have, namely: to enable its parent, United States Steel Corporation, to sell prefabricated house packages. While some conventional lenders might be willing to take higher risks than others, the evidence is that during the period of time in question in this lawsuit no conventional lenders were willing to take the degree of risk which Credit Corporation was voluntarily and deliberately willing to take for its purposes. This was particularly true insofar as Fortner Enterprises was concerned.

Millions of dollars of loans were made under the special financing category as identified in the Underwriting Agreement filed in this case. All of those loans contained the tie-in provisions. The Credit Corporation thus utilized very effectively the special financing program to enable the Homes Division of United States Steel Corporation to sell millions of dollars of prefabricated houses. This is one of the elements of evidence establishing the

economic power or leverage of the Credit Corporation. The fact that the Homes Division was able to obtain a higher price for its prefabricated package in the same condition of a conventional house is again evidence of the Credit Corporation's leverage, or economic power. While the defendants argue that the Homes Division had a loss during the period in question, the Court does not really find this significant since the Homes Division's loss might well have been greater if the loan program which apparently was its prime method of obtaining sales had not been utilized. Further, the Court does not feel that you can separate the Homes Division from United States Steel as a whole.

4. The Court finds that the only purpose of the Credit Corporation in making loans, particularly under the special financing category, was to increase the sales of prefabricated house packages by United States Steel Corporation. This is not the type of business justification contemplated by the decided cases, including the Supreme Court's Opinion in this case. The Court does not find any evidence in this record to justify the arrangement attacked by the plaintiff.

5. The undisputed evidence established that the special financing program of the Credit Corporation was authorized by the Finance Committee of United States Steel Corporation. Loans were made by the Credit Corporation under that program under the direction of personnel of Homes Division. The United States Steel Corporation and the personnel of the Homes Division used the Credit Corporation's loans as a sales "tool".

6. The Court thus finds that all of the required elements of an illegal tie-in agreement did exist since the tie-in itself was present, a not insubstantial amount of interstate commerce in the tied product was restrained and the Credit Corporation did possess sufficient economic power or leverage to effect such restraint. The Court also finds that United States Steel Corporation and the Credit Corporation as separate corporate entities did combine or conspire to institute or put into effect this illegal tie-in agreement and that both defendants are responsible and liable therefor.

7. Since this Court has found a per se violation of Section 1 of the Sherman Act by the defendants pertaining to the illegal tie-in agreement, as described above, it is actually not necessary for this Court to decide whether the plaintiff has established a conspiracy to monopolize violative of Section 2 of the Sherman Act. However, since there may be an appeal of this action, the Court in the alternative does find that all of the elements of a conspiracy to monopolize do exist in this record. First, the Court finds that the defendants did combine or conspire to increase sales of prefabricated house packages by United States Steel Corporation by the making of loans to numerous builders containing the tie-in provision. The making of the loans containing the tie-in provision were overt acts in and of themselves in furtherance of the combination or conspiracy. In the context of this particular suit, the Court also finds that the defendants combined or conspired to threaten to enforce or enforce the tie-in provisions of the loan agreement by

threatening foreclosure on Fortner Enterprises' property and taking certain steps to commence the foreclosure procedure. The Court finds that the millions of dollars of loans made under the special financing program affecting millions of dollars of sales of prefabricated house packages clearly affected a substantial amount of interstate commerce in both the loans themselves and the prefabricated house packages. Finally, the Court finds that the sole purpose of the loan programs of the Credit Corporation was specifically and deliberately to increase the share of the market of United States Steel Corporation in prefabricated house packages and that the implementation of the program constitutes the necessary evidence of intent to monopolize required. Thus, the evidence described in the Findings of Fact set forth above establishes an illegal conspiracy to monopolize in violation of Section 2 of the Sherman Act.

8. Having found the defendants to be guilty of the per se violation of Section 1 of the Sherman Act and the Sixth Circuit having directed that only the issue of liability be re-tried since a jury has already decided the amount of plaintiff's damage and since a Judgment has already been entered for said damages trebled plus attorneys' fees and costs and said claim having been, therefore, previously established as to amount and thereby liquidated, a Judgment will be entered in this action for the total amount of that previous Judgment of $427,016.75 bearing interest at the rate of 6% per annum from September 18, 1970, until paid. Having found

for the plaintiff in this action and the Sixth Circuit Court f Appeals having held that costs should be taxed against the defendants as a result of the last appeal to the Sixth Circuit, the Judgment to be entered will also contain an additional award of attorneys' fees and costs to the plaintiff in this action. Counsel for the plaintiff shall prepare and file the necessary Motion for award of attorneys' fees and costs with supporting Affidavits within twenty days of the entry of these Findings and counsel for defendants shall have twenty days thereafter in which to respond.

James F. Gordon
United States District Judge

Copies to:

Mr. Kenneth L. Anderson
Mr. A. Scott Hamilton
Mr. Albert F. Reutlinger

ENTERED
AUG 13 1974
AUGUST WINNENHOFEN JR., CLERK
BY DEPUTY CLERK
B Hawkins

375—Affidavit of Service

United States Court of Appeals
for the Second Circuit

The Reporter Co., Inc. 11 Park Place, New York, N. Y. 10007

Cheryl Perry Hill, Thelma Lindo, Victoria Raphael, Lurline Rutherford and Ansonia Lewis for themselves and all persons similarly situated

Plaintiffs-Appellants

against

A.T.O. Inc., Family Buying Power Inc., Nationwide Promotions Inc. et L.

Defendants-Appellees

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Norman S. Langer Esq. being duly sworn, deposes and says that he is over the age of 21 years and resides at 8 Mill Lane Levittown, New York

That on the 15th. day of October 1975 at 152 Court Street Brooklyn, New York he served the annexed Brief upon John C. Gray Jr. c/o Brooklyn Legal Service in this action, by delivering to and leaving with said attorney 3 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 15th.
day of October 1975

Raymond J Braddick

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4507705
Qualified in Delaware County
Commission Expires March 30, 1977